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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2160**

In the Matter of the Civil Commitment of: David Bryon Baker

**Filed May 5, 2009
Reversed and remanded
Larkin, Judge**

Clay County District Court
File No. 14-PR-08-980

Brian J. Melton, Clay County Attorney, Clay County Courthouse, 807 11th Street North, P.O. Box 280, Moorhead, MN 56561-0280; and

Lori Swanson, Attorney General, Ryan Ellis, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101 (for appellant)

Ryan B. Magnus, Zack, Jones and Magnus, 300 St. Andrews Drive, Suite 110, Mankato, MN 56001 (for respondent)

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's conclusion that respondent is not highly likely to engage in further acts of harmful sexual conduct and therefore does not meet the criteria for commitment as a sexually dangerous person. Because appellant proved, by clear and convincing evidence, that respondent meets the statutory criteria for civil

commitment as a sexually dangerous person, we reverse and remand for entry of a civil commitment order.

FACTS

Respondent David Bryon Baker has an extensive history of sexual offenses committed against young girls spanning at least 24 years and involving at least 16 victims. Baker also has an extensive history of nonsexual criminal activity and substance abuse.

Baker offended against his first victim, the 12- to 13-year-old cousin of a friend of Baker's, sometime between 1974 and 1976. Baker fondled the girl's breasts and vagina both above and under her clothes, and rubbed her vagina with his penis, but did not penetrate her vagina. Baker was between 16- and 17-years old at the time. At age 17, Baker offended against a 10-year-old girl by again touching, but not penetrating, her vagina with his penis. At age 20, Baker offended against a 2-year-old girl by placing his penis in her mouth. While still in his 20s, Baker offended against two 12-year-old girls and one girl who was between 11- and 12-years old.

In 1991, Baker offended against a six-year-old girl who was visiting Baker's home. Baker was masturbating while watching a movie with multiple sex scenes when he noticed the girl had entered the room. The girl asked Baker what he was doing. Baker told her he was making himself feel good. Baker proceeded to show her how to masturbate him. After approximately five minutes of the girl touching his penis, Baker removed the girl's pants and underwear, sat the girl on his lap, and moved her back and forth in such a way that her vagina rubbed over his penis until he ejaculated.

Approximately two weeks later, Baker offended against the same girl in an almost identical fashion.

Baker also victimized an unidentified girl between the ages of 8- and 11-years old, an unidentified 6-year-old girl, and an unidentified girl between the ages of 13- and 15-years old. Baker offended against the first unidentified girl while they were watching television by repeatedly attempting to rub her leg in such a way that his hand slid under her shorts and brushed against her vagina. On one occasion, Baker was giving the girl a ride home when he stopped along a gravel road and quickly masturbated with her in the car, looking out the window. Both the unidentified 6-year old and the unidentified 13- to 15-year old were guests spending the night at Baker's home. In both cases, Baker offended against the girls while they were sleeping by fondling them, removing their clothing, and in one case, rubbing his penis on the sleeping child's vagina.

Baker was not charged for any of the above offenses, but he admitted to them at the commitment hearing.

Baker's first sexual-assault charges arose from a 1982 incident involving a three-year-old girl identified as C.C. and a six-year-old girl identified as K.C. The complaint in that case alleged that Baker penetrated C.C.'s mouth with his penis and penetrated her vagina with his finger. The complaint also alleged that Baker penetrated K.C.'s vagina with his finger. Baker admitted that he performed oral sex on both girls and that he had touched their genital areas with his hand. Baker also admitted that he asked K.C. to touch his penis, showed her how to masturbate him, and fondled both K.C.'s and C.C.'s vaginas over their clothing while K.C. rubbed his penis. Baker stated that he told the

girls they could suck on his penis like a lollipop, but both girls shook their heads “no.” Baker pleaded guilty to sexual abuse in the first degree, but it is unclear which victim the plea referenced.

Baker also has an extensive history of chemical use and treatment. Baker admits that he started using alcohol between the ages of 10 and 11, but claims to have stopped drinking in 1996. Baker has also admitted to using various prescription and street drugs including methamphetamine, LSD, marijuana, morphine, codeine, heroin, and Klonopin. Baker’s chemical treatment history includes several stays in detox, as well as successful and unsuccessful completion of treatment programs. In 1995, Baker was judicially committed as chemically dependent. In early 2002, Baker was denied admission to a treatment program because assessors found he was not amenable to treatment.

In 2001, Baker pleaded guilty to two amended counts of fourth-degree criminal sexual conduct for the sexual abuse of his stepdaughters, J.M.C. and A.C. Baker admitted that from 1992-1994 he repeatedly sexually abused J.M.C., who was between 10- and 13-years old at the time. Baker would regularly touch J.M.C.’s breasts above and beneath her clothes. On one occasion, Baker attempted to move his hand under J.M.C.’s shirt and down toward her vaginal area, under her clothing. J.M.C. stopped Baker and told him, “Don’t.” Baker’s abuse ultimately proceeded to a point where he would rub and squeeze J.M.C.’s breasts for 10 to 15 minutes nightly after she got into bed. The abuse continued like this for two years until J.M.C. told Baker to stop touching her. Baker claims he did not touch her after that.

There is some dispute whether Baker's abuse of A.C. started in 1992 or after J.M.C. told Baker to stop touching her. Baker's abuse of A.C. continued until 1997 when Baker was approximately 39 years old and A.C. was 13. Baker offended against A.C. by touching her breasts over her clothing at night while she slept. Baker reported that he only touched A.C. at night when she was sleeping.

In 2002, authorities in North Dakota charged Baker with an offense that occurred in 2000 involving a 12- or 13-year-old girl. The girl told police that she was spending the night at Baker's house as a guest of Baker's girlfriend's daughter. She stated that she fell asleep on the couch and awoke to find Baker had his hand underneath her shirt, on her breast. Baker was about 42 years old at the time. Baker pleaded guilty to one count of impermissible sexual contact.

For his offenses against J.M.C. and A.C., Baker was convicted of two counts of fourth-degree criminal sexual conduct, given a stayed sentence, and placed on probation in Otter Tail County. As a condition of his probation, Baker underwent a psychological evaluation. The results of this evaluation indicated that (1) Baker tended to have indiscriminate sexual relations with strangers beginning at age 14, (2) Baker was not motivated to participate in sex offender treatment, (3) Baker had acute psychosexual dysfunction, and (4) he tended to utilize aggression as a way of coping with his psychological difficulty. Baker also underwent a chemical dependency evaluation, which recommended abstention from mood-altering substances, successful completion of extended care chemical-dependency (CD) treatment, a minimum of 90 days at a halfway

house, weekly attendance at a support group for two years, and completion of sex-offender treatment.

In September 2002, Baker successfully completed CD treatment at the Fergus Falls Regional Treatment Center. Baker entered a halfway house program at Lakes Region Halfway Homes, but was discharged from the program for failure to abstain from mood-altering substances. Staff at the halfway house noted that Baker's behavior was comparable to someone using "downers." The district court found Baker to be in violation of his probationary terms and executed his stayed prison sentence. However, given the limited amount of time remaining to be served, Baker served his sentence in a local jail, rather than in a Minnesota correctional facility. Staff at the Minnesota Department of Corrections determined that Baker did not meet the criteria for review by the Minnesota Sex Offender Program. Baker was eventually put on supervised release and assigned an offender risk level of two. After his release, Baker began a sex-offender-treatment program but was discharged for failing to pay for the program. Because his discharge constituted a violation of the conditions of his release, Baker was reincarcerated, this time at a Minnesota correctional facility.

Upon his release from custody, Baker entered sex-offender treatment at the Upper Mississippi Mental Health Center (UMMHC). Baker was not successful in this program. Baker received sanctions for ordering pornographic movies on his roommate's cable television account and was ultimately discharged from the program for failure to abstain from mood-altering substances. Baker admitted he had been taking the prescription drug Klonopin, which had not been prescribed for him. Baker again returned to confinement

in a Minnesota correctional facility, where he remained until the petition for civil commitment was filed in this case. Baker has remained on a judicial hold at the state hospital in St. Peter, pending this appeal.

Appellant, the State of Minnesota, filed a petition seeking Baker's civil commitment as a sexually dangerous person (SDP) and as a sexual psychopathic personality. Appellant later amended the petition and dismissed the latter allegation. At the civil commitment hearing, the district court heard the testimony of Dr. James Gilbertson and Dr. Mary Kenning, the court-appointed examiners. Both examiners testified that Baker meets the statutory requirements for commitment as an SDP. Both examiners also testified that, in their opinion, Baker is highly likely to reoffend in the future.

The district court also heard testimony from four witnesses who claimed that Baker had abused them. The first witness, B.D.B., was Baker's stepdaughter. Baker was charged with rape for the alleged sexual assault of B.D.B. She was four-years old at the time of the alleged offense. Baker denied abusing B.D.B., and claimed that the charges were made up by his first wife during the pendency of their divorce and noted that the charges were eventually dropped. The second witness, K.L., was also Baker's stepdaughter. She alleged that Baker abused her from when she was 6-years old until she was 12-years old by exposing his penis to her, forcing her to touch his penis, touching her body over and under her clothing, and performing oral sex on her. Baker also denied abusing K.L. The third witness, Baker's daughter S.J.B., testified that Baker had abused her both physically and sexually starting when she was between two- and three-years old.

Baker denied these allegations. Finally, a male identified as D.A.H. testified that Baker abused him when D.A.H. was nine-years old. Baker was never charged with sexually assaulting D.A.H. and testified that he did not abuse D.A.H. The district court declined to make any findings regarding the testimony of these four witnesses or whether there was clear and convincing evidence that any of the alleged conduct had in fact occurred, stating that “further discussion or findings regarding these allegations is unnecessary” given the district court’s other findings.

Baker testified that he understood what he had done, that he was remorseful, and that he understood how his substance abuse and cognitive processes played a role in his offenses. Despite the opinions of the two examiners, the district court found that there was not clear and convincing evidence that Baker is highly likely to reoffend, denied appellant’s petition for commitment, and ordered that Baker be released. This appeal follows.

D E C I S I O N

Minn. Stat. § 253B.18, subd. 1 (2008), provides for the civil commitment of sexually dangerous persons.¹ A person is considered sexually dangerous if that person:

- (1) has engaged in a course of harmful sexual conduct as defined in subdivision 7a;
- (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and

¹ See Minn. Stat. § 253B.02, subd. 17(b) (2008) (defining “person who is mentally ill and dangerous to the public” to include “[a] person committed as a sexual psychopathic personality or a sexually dangerous person”).

(3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 7a.

Minn. Stat. § 253B.02, subd. 18c. “‘Harmful sexual conduct’ means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253B.02, subd. 7a(a). An individual must be highly likely to continue to engage in acts of harmful sexual conduct to be considered an SDP. *In re Linehan*, 557 N.W.2d 171, 190 (Minn. 1996), *vacated on other grounds and remanded sub. nom. Linehan v. Minn.*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999) (*Linehan II*).

Baker concedes that he has engaged in a course of harmful sexual conduct and that he has manifested a sexual personality, or other mental disorder or dysfunction (specifically, that he is a pedophile). As to the third prong of the SDP definition, whether Baker is highly likely to engage in acts of harmful sexual conduct, the district court concluded, “there is not clear and convincing evidence that it is highly likely that Baker will engage in further harmful sexual conduct.” In support of its conclusion, the district court stated:

Although he has not completed sex offender treatment, he has benefited from treatment. Baker is older and his risk of reoffending continues to decrease[] as he ages, especially coupled with the amount of time which has passed since his last offense, even though not all of the time which has elapsed was spent in the community. The actuarial instruments showed Baker to be borderline in terms of being a *high* risk to reoffend. Baker does not have access to young children in his household as he has had in the past. In addition, he shows good insight into his offenses and his pattern of offending. He shows great remorse and has an understanding of [the]

impact his abuse has had on his victims. “Borderline,” when coupled with Baker’s displayed insight and remorse, does not equate to clear and convincing evidence of his being *highly likely* to reoffend. For all of the reasons described above, Baker does not meet the criteria for commitment as a “sexually dangerous person” under Minnesota Statutes § 253B.02, subd. 18c (2008).

The state argues that the record does not support the district court’s conclusion that Baker is not highly likely to engage in acts of harmful sexual conduct. Whether the facts of a case satisfy the statutory standard for civil commitment is a question of law subject to de novo review. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). Accordingly, we independently determine whether the district court’s findings of fact satisfy the statutory standard for Baker’s civil commitment as a SDP.

Six factors are considered when examining whether an offender is highly likely to reoffend, including: (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. *Id.* at 614. “[I]t 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 state must prove that the person subject to civil commitment as an SDP has serious difficulty controlling his behavior, *Kansas v. Crane*, 534 U.S. 407, 410, 122 S. Ct. 867, 869 (2002), and lacks adequate control of his sexual impulses, *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan III*).

With regard to demographic characteristics, the district court found that Baker's age, coupled with the time that had elapsed since his last offense, decreased his risk to reoffend. While Baker was age 50 at the time of the commitment proceedings, Baker had continued to commit acts of sexual misconduct at age 42. And while Baker's last documented sexual offense occurred in 2000, Baker has been under supervision, incarcerated, or in residential treatment since 2001. Good behavior in an artificial environment is not determinative on the issue of dangerousness to the public. *In re Babo*, 376 N.W.2d 429, 432 (Minn. App. 1985). The district court's findings demonstrate that Baker offended against his first victim sometime between 1974 and 1976, then had a long string of victims, sometimes overlapping, until at least 2000. Baker's longest period without a reported victim, since he began offending, was from approximately 2001 to the present, during which time he has been under near constant supervision if not incarcerated. The district court's findings do not establish any significant period of time during which Baker resided in the community in an unsupervised capacity and did not offend.

With regard to Baker's history of violent behavior, despite his extensive history of criminal and sexual offenses, Baker does not have a significant history of violent behavior. In 1978, Baker was convicted of armed robbery for an incident robbing a gas station with what he claimed was a gun. The district court also noted allegations of physical abuse made by B.D.B., K.L., and D.A.H. in their testimony, but made no findings regarding these allegations. It does not appear from the record that Baker used

physical violence to offend against his victims, but rather that he chose his victims because, as children, they were easier to control and they did not judge him.

With regard to base rate statistics, the district court noted that both experts testified that “Baker has a number of static, historical, and dynamic factors that support a finding that he meets the highly likely standard.” The experts testified that the results of the actuarial tools used, taken in conjunction with other dynamic factors, showed Baker to have a high risk of reoffending. The district court noted that Dr. Gilbertson scored Baker at a personal risk score of seven on the Minnesota Sex Offender Screening Tool – Revised (MNSOST-R), which Dr. Gilbertson testified placed Baker in groups with a moderately high to high risk for rearrest for sex offenses. Dr. Kenning scored the same instrument with Baker having a personal risk score of nine.

The district court found that Baker’s scores placed him well below the mandatory commit score on the MNSOST-R. It is unclear from the record, however, that the MNSOST-R actually includes a level for a mandatory commitment. Dr. Gilbertson testified that a score of plus 13 on the tool would result in presumptive commitment but later clarified that a score of plus 13 or above indicates a presumptive level-three offender risk level that results in referral to the county attorney for commitment proceedings.²

The court-appointed examiners’ testimony regarding Baker’s actuarial scores establishes that Baker is in a moderately high to high-risk category for reoffense. The district court’s conclusion that Baker is not highly likely to reoffend is based, in significant part, on its finding that Baker was merely “borderline” high risk and “on the

² Baker has consistently been rated as a risk level-two offender.

culp” of high risk. But the fact remains that the actuarial test results that are reflected in the district court’s findings place Baker in a moderately high to high-risk category. Both experts testified that, even though Baker’s actuarial scores placed him in the moderately high to high-risk categories, the actuarial scores, considered in conjunction with other dynamic factors, led each of them to conclude that Baker was at a high risk to reoffend. The district court’s distinction between “high risk” and “borderline high risk” appears to be a distinction without a difference. Moreover, “[s]tatistical evidence of recidivism is only one of the six factors,” and the district court should not overemphasize one factor over another. *Linehan II*, 557 N.W.2d at 189 (stating that “the district court properly followed *Linehan I* and evaluated evidence pertaining to each of the six factors”).

With regard to sources of stress in Baker’s environment, the district court found that Baker claims to have stopped drinking in 1996 and that Baker last successfully completed a CD treatment program while incarcerated. While it is true that Baker completed a course of CD treatment while incarcerated, Baker has no recent demonstrated success in remaining chemically free while not in custody. Baker completed his last course of CD treatment while he was incarcerated at a Minnesota correctional facility, and upon his release from that facility, he was immediately placed on a judicial hold at the St. Peter hospital. Prior to the judicial hold, Baker was incarcerated because he violated his supervised release by using a non-prescribed controlled substance while enrolled in a sex-offender treatment program. Baker was terminated from the sex-offender treatment program based on his substance use. And

Baker has not demonstrated any reduction in the effect that his chemical dependency has as a stressor leading to Baker's commission of harmful sexual conduct.

The district court found that Baker's chemical abuse has "led to many convictions, including armed robbery, sexual abuse, prescription drug fraud, DWIs, and probation violations." The district court also noted that "Baker was either drinking or using drugs during all of his sexual offenses." Baker agreed with the assessment of both experts that he is a pedophile. The evidence establishes that Baker's chemical dependency, a major stressor which has contributed to his offenses, will continue to indicate a likelihood of reoffense.

The district court also found that Baker has "no idea" how many jobs he has lost during his life, but that it was more than ten, most of those owing to chemical use, arriving late to work, or not showing up for work. There is no indication from the record that Baker's employment prospects have improved since his last incarceration, leaving him with questionable means to support himself. Baker has indicated that he plans to live with his 25-year-old girlfriend if he is released, but as noted by the district court, assessors at UMMHC were concerned that such a living arrangement demonstrated that Baker was impulsive and very immature in his thinking. Moreover, given Baker's troubled history with relationships, nothing in the record demonstrates that this living arrangement will be stable. In sum, Baker will face significant stress upon release, and these stressors are similar to those Baker has experienced while offending in the past.

With regard to whether Baker's current circumstances are similar to those contexts in which he used violence in the past, the district court found that Baker will not currently

have access to children in his household. But only 2 of the 16 victims Baker admits to abusing actually resided with him at the time of the abuse. The other victims were all children who visited Baker's home, friends of children who did live in Baker's home, and children of Baker's friends. While the district court's finding that Baker will not have access to children in his household is not clearly erroneous insofar as there are no children residing in Baker's girlfriend's home where Baker intends to reside, it does not follow that Baker will not have access to children. History demonstrates otherwise.

Baker is an admitted pedophile and chemically dependent. There is no finding that Baker has an adequate relapse-prevention plan that will decrease his risk of chemical use and reoffense. Nor is there a finding that Baker has employment prospects that will provide him a means of support and stability. Baker's present and future circumstances are substantially similar to those in which Baker has offended in the past.

The last factor to be considered is Baker's record with respect to sex therapy programs. The district court concluded that, although Baker has not completed sex-offender treatment, he has benefited from it. The district court did not articulate what benefit it believes Baker received.

While Baker may have received some benefit from his incomplete attempt at sex-offender treatment, the district court's findings indicate that Baker has not benefited from treatment such that he is not highly likely to reoffend. During a 2004 sex-offender assessment, the assessor opined that Baker was at some risk to reoffend because of the difficulty he experienced maintaining sobriety. Upon discharge from CD treatment in 2005, treatment personnel noted that Baker demonstrated minimal acceptance of

responsibility for his criminal belief system. That assessment also noted that Baker demonstrated some ability to internalize the principles of the treatment program, but that Baker had successfully completed treatment in the past only to relapse and once outside the program, his ability to apply the principles he learned may change.

Upon reentering sex-offender treatment in 2005, treatment staff indicated that Baker rated poorly in the following categories: “Receives appropriate feedback; Acknowledges responsibility for offenses without denial, minimization or blaming others; Positive changes made in lifestyle; Demonstration of empathy for victims; Ability to manage stress and negative feelings; Positive family interactions; Openly examines thought process[es], fantasies and behaviors; and Treatment tasks completed.” In an updated assessment during that stay in treatment, staff noted that Baker’s judgment and insights were poor, and that he was impulsive and immature in his thinking. Also during this course of treatment, Baker was found to have violated program rules by ordering pornographic material on his roommate’s cable account without his roommate’s permission. An assessor noted that this action “demonstrated very narcissistic, immature thinking” and that Baker acted “with no regard to the consequences or harm he might cause another human being.” The assessor further noted that Baker continued “to demonstrate in his own life a lack of integrating treatment, being very narcissistic and impulsive in his thinking and his behaviors, unable to put off gratification and continue[d] to act more child-like than as an adult male.” Baker was ultimately terminated from that treatment program for failing to abstain from mood-altering substances. As recently as June 2007 Baker denied sexually abusing A.C., and denied

any sexual attraction to children. These findings do not indicate that Baker has gained any appreciable benefit from sex-offender treatment, such that he is not highly likely to reoffend.

The district court also found that Baker shows good insight into his offenses and his pattern of offending. We recognize that this finding rests, in large part, on the district court's determination of Baker's credibility as a witness. The district court found that Baker "exhibited good and sincere insight into his patterns of offending and the correlation between his offending and his substance abuse, and the cognitive processes involved in both" as well as "the effects his actions had [] on his victims." The district court gave great weight to Baker's testimony regarding the benefits he received from treatment and his ability to control his sexual behavior in the future. The district court concluded that Baker's "borderline" actuarial scores and "displayed insight and remorse" do not amount to clear and convincing evidence that Baker is highly likely to reoffend. We disagree. Baker's testimony regarding his insight and remorse does not outweigh the extensive district court findings that support a conclusion that Baker is highly likely to reoffend.

The record establishes by clear and convincing evidence that Baker is highly likely to reoffend as a result of his extensive history of harmful sexual conduct and pedophilia. Baker has a consistent history of sexually abusing young children that spans at least 24 years. Baker continued to offend at the age of 42. While there are no documented incidents of sexual abuse committed by Baker since 2000, Baker has been under supervision by the court, in residential treatment or incarcerated since 2001. Baker's

actuarial scores indicate that he presents a moderately high to high risk of reoffense. Baker has an extensive history of chemical abuse that has contributed to his sexual offenses. Despite multiple treatment interventions for chemical dependency, Baker continued to use illegal substances while he was on conditional release and in residential sex-offender treatment for his most recent offenses. And finally, Baker has never completed sex-offender treatment, having been discharged without successful completion on two occasions. The district court's findings of fact satisfy the statutory requirements for Baker's civil commitment as an SDP. We reverse and remand for entry of a civil commitment order consistent with this opinion. Because we reverse on this ground, we do not address appellant's other claims of error.

Reversed and remanded.

Dated: _____

The Honorable Michelle A. Larkin
Minnesota Court of Appeals