STATE OF MINNESOTA
IN COURT OF APPEALS
A10-3

In the Matter of the Civil Commitment of: Matthew Carl Brown

Filed May 11, 2010
Affirmed
Larkin, Judge

Lincoln County District Court
File No. 41-PR-09-92

Robert L. Gjorvad, Runchey, Louwagie & Wellman, P.L.L.P., Marshall, Minnesota (for appellant)

Lori Swanson, Attorney General, Noah A. Cashman, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

LARKIN, Judge

Appellant challenges his commitment as a sexual psychopathic personality (SPP) and sexually dangerous person (SDP). Appellant argues that the district court erred by concluding that he has an utter lack of power to control his sexual impulses and is dangerous to others as a result, and that he is highly likely to engage in harmful sexual

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

conduct in the future. Because appellant's commitment as an SPP and SDP is supported by clear and convincing evidence, we affirm.

FACTS

On May 5, 2009, respondent Lincoln County petitioned the district court to commit appellant Matthew Carl Brown as an SPP under Minn. Stat. § 253B.02, subd. 18b (2008), and an SDP under Minn. Stat. § 253B.02, subd. 18c (2008). The district court appointed Linda Marshall, Ph.D., and Robert Riedel, Ph.D., to serve as the court-appointed examiners. The district court held a commitment hearing on August 10 and 11. The evidence showed that Brown has an extensive history of sexual misconduct spanning a 15-year time frame, which began when he was approximately 14 years old. Brown's victims included adults, vulnerable adults, and children. His sexual offenses occurred frequently, and they were often violent. Both examiners opined that Brown meets the criteria for commitment as an SPP and SDP.

Following the commitment hearing, the district court committed Brown to the Minnesota Sex Offender Program (MSOP) as an SPP and SDP on an interim basis. At the 60-day review hearing under Minn. Stat. § 253B.18, subd. 2 (2008), the district court found that "Brown continues to meet the criteria as an SDP and SPP and is an appropriate candidate for MSOP treatment." The district court ordered that Brown be indeterminately committed as an SDP and SPP. This appeal follows.

D E C I S I O N

Brown argues that the evidence does not establish that he meets the standards for commitment as an SPP and SDP. A petitioner must prove the elements of commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). On review, 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 we review 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).

I.

The Minnesota Commitment and Treatment Act defines an SPP 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. In order to commit an individual as an SPP, 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. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). Brown concedes that he has engaged in a habitual course of misconduct involving sexual matters, but argues that the district

court's findings that he has an utter lack of power to control his sexual impulses and that he is dangerous to others as a result are not supported by clear and convincing evidence.

A. Utter Lack of Power to Control Sexual Impulses

When determining whether an individual has an utter lack of power to control his or her sexual impulses, the district court must weigh several 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 that impulse. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994).

With regard to the nature and frequency of Brown's sexual assaults, the evidence shows that his sexual offenses spanned a 15-year time frame, began when he was approximately 14 years old, and involved a diverse victim pool, including males, females, adults, vulnerable adults, and children. His victims ranged in age from 5 to 40 years old. The sexual assaults occurred frequently. Almost immediately after his release from jail for assaulting one victim, Brown assaulted another.

The district court made extensive findings regarding Brown's sexual offense history, which are not challenged on appeal. Brown was born on October 17, 1975. Brown admitted that when he was ten years old, he began stealing undergarments from his mother and sister and used the garments to masturbate. Brown also admitted that he engaged in sexual acts with animals when he was younger, including cattle, pigs, and a

female dog. While Brown has since denied these allegations, the district court found that his denials were not credible.

In the fall of 1989, Brown began to sexually abuse his five-year-old sister, B.B. B.B. reported the abuse to her siblings, who told B.B.'s mother and father. B.B.'s father discussed the abuse with Brown, but B.B. reported that Brown continued to sexually abuse her. B.B. reported that Brown penetrated her vagina and anus with his penis on four different occasions. B.B. reported that the abuse usually occurred in Brown's bedroom, but on one occasion Brown took B.B. to a field and sexually assaulted her there. B.B. told medical personnel that the sexual abuse caused "the sides of [her] private spot" to become sore, it hurt for a few minutes when Brown penetrated her anus, it stung when she urinated, she bled and it hurt when she defecated, and there was "kind of a lot" of blood in her underwear after Brown sexually assaulted her. She also reported that Brown hit her after she reported the sexual abuse.

The district court adjudicated Brown delinquent for sexually assaulting B.B. and committed him to the commissioner of corrections for placement at the Austin Sheriff's Youth Program (ASYP). Brown was deemed to have successfully completed this treatment program.

In late 2001, Brown sexually assaulted 19-year-old A.N.W., a female vulnerable adult who suffers from Down's Syndrome and is mildly to moderately mentally handicapped. A.N.W. reported that Brown "touched her private parts and she did not like it," and that Brown "touched her peepee with his w[ie]ner and then [Brown] wanted her to touch him." When A.N.W. refused, Brown forced her to touch him. A.N.W. stated

that Brown "put [his penis] inside of her one time and that it really hurt." She also reported that Brown hit her on the buttocks with a board.

Brown was charged with third- and fourth-degree criminal sexual conduct for his assault of A.N.W. He pleaded guilty, and the district court placed Brown on probation. The terms of his probation included 270 days in jail, completion of a sex-offender evaluation and recommendations, and no unsupervised contact with vulnerable adults.

In June 2002, while he was on probation for assaulting A.N.W, Brown sexually assaulted a male vulnerable adult, M.W. M.W. is "a functional vulnerable adult because of [an] infirmity that impairs his ability to adequately care for [him]self and protect [himself] from maltreatment." According to M.W., Brown visited M.W.'s home on two occasions. On the first occasion, Brown left several items at M.W.'s home including 11 women's bras, one pair of women's underwear and a "red teddy." On the second occasion, M.W. and Brown smoked marijuana and consumed alcohol, and Brown asked M.W. to remove his clothing. M.W. complied, and Brown gave M.W. a "red garment of women's clothing" and asked M.W. to put it on. M.W. stated that Brown then removed his own clothing, masturbated in front of M.W., and performed oral sex on M.W. When Brown was finished, Brown asked M.W. to engage in anal sex, but M.W. refused.

Brown acknowledged that his contact with M.W. violated the terms of his probation, but indicated that he "didn't give it consideration [and] … did not think it was a big deal." Brown admitted that he asked M.W. if he could "insert his penis into [M.W.'s] buttocks," but Brown denied that any other physical contact occurred, "other than a pat on the shoulder." Brown was charged with third-degree criminal sexual

conduct, attempted third-degree criminal sexual conduct, and solicitation of a mentally impaired person. In January 2003, Brown pleaded guilty to third-degree criminal sexual conduct, and the district court sentenced Brown to serve 88 months in prison.

In July 2004, while Brown was incarcerated at Minnesota Correctional Facility-Rush City (MCF-RC), Brown's roommate, L.K., reported that Brown propositioned him to engage in anal sex. L.K. indicated that Brown had similarly propositioned him when they roomed together at Minnesota Correctional Facility-Moose Lake (MCF-ML), and that Brown continued to proposition him upon Brown's arrival at MCF-RC. L.K. stated that Brown threatened to rape L.K. "during the night by pulling down his pants and perform[ing] anal sex" while L.K. slept. L.K. also reported that Brown told him that he ejaculated into L.K.'s drinking cup while they were at MCF-ML. DOC staff charged Brown with Unsanitary Acts and Conditions, Threatening Others, and Sexual Behaviors. Brown pleaded guilty to Sexual Behaviors, and received 30 days of segregation, suspended for 90 days.

The evidence also shows that Brown committed sexually motivated burglaries on multiple occasions. Brown broke into homes and stole undergarments, lingerie and money. Brown used the lingerie and undergarments to masturbate. These burglaries occurred at seven different homes. Brown was charged with and pleaded guilty to three counts of second-degree burglary.

With the exception of some of the burglary victims, Brown knew his victims. And Brown's sexual offenses were violent. Brown admitted that he hit B.B. and "threatened to beat her up if she told anyone about the abuse." Brown testified that he pushed

A.N.W. to the ground and held her down while he sexually assaulted her. M.W. reported that Brown threatened to kill him if he told anyone what had happened. Moreover, Brown has shown minimal remorse for his victims, does not accept full responsibility for his actions, and has what Dr. Marshall characterized as a "nonchalant" attitude toward his present situation. And Brown does not have a fully developed reoffense prevention plan. "[L]ack of a relapse prevention plan can show an utter lack of control." *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995).

There is no evidence that Brown's medical and family history impacts his power to control his sexual impulses. But both court-appointed examiners opined that Brown's psychological and neuropsychological testing suggests antisocial behavior and a diagnosis of paraphilia and personality disorder. The examiners also identified a number of other factors that suggest Brown is unable to control his actions, including Brown's inability to apply what he has learned in sex-offender treatment.

Brown's principal argument is that the evidence does not show that he has an utter lack of power to control his sexual impulses because the evidence indicates that he planned his offenses, groomed his victims, and waited for opportune times to offend. This argument is refuted by precedent. The fact that Brown engaged in "grooming" behavior does not preclude a finding of utter lack of control where there is an inability to stop such behavior and other indications of a lack of power to control. *See In re Preston*, 629 N.W.2d 104, 111 (Minn. App. 2001) ("Though grooming and planning behavior can show the ability to control the sexual impulse, where the grooming behavior itself is uncontrollable, the impulse is likewise not controllable." (Footnote omitted.)); *In re*

Bieganowski, 520 N.W.2d 525, 530 (Minn. App. 1994) (noting that "[a]lthough the 'grooming' process requires time, thus eliminating any 'suddenness' regarding the sexual activity, the habitual nature of appellant's predatory sexual conduct indicates an inability to stop the 'grooming' behavior"), *review denied* (Minn. Oct. 27, 1994). Thus, Brown's argument that the county failed to establish that he has an utter lack of power to control his sexual impulses because he planned his attacks, "groomed" his victims, and waited for opportune times to offend is unavailing. The district court's finding that Brown has an utter lack of power to control his sexual impulses is supported by clear and convincing evidence.

B. Dangerous to Others

Six factors are considered when determining whether an offender presents a serious danger to the public: (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. *Linehan I*, 518 N.W.2d at 614.

Regarding demographic characteristics, Dr. Riedel's report lists several characteristics associated with a high rate of recidivism, including Brown's gender and the fact that Brown has undergone "significant sex offender treatments and continued to reoffend." Brown's age does not lower his risk of reoffending. And as discussed above, Brown's sexual offenses were violent.

Both court-appointed examiners opined that base-rate statistics indicate that Brown's risk of reoffense is high. The examiners considered a variety of risk factors, actuarial tools, and structured-clinical-judgment tools. The district court found that Brown's scores placed him in high- or very-high risk categories. Brown argues that "[n]one of the actuarial tools employed by the examiners provide any objective basis for determining that the [county] has established that Brown is 'highly likely' to sexually re-offend." But the experts' reports and the district court's findings based on those reports indicate that all of the statistical analyses place Brown in the high- or very-high risk to reoffend categories. Brown argues that the assessments were flawed and that the opinions based on those assessments were not credible. But the district court found the examiners' testimony and opinions based on the test results credible. This court will not reweigh the evidence, and we defer to the district court's opportunity to judge the credibility of the witnesses. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

With regard to the sources of stress in Brown's environment, the examiners' reports indicate that Brown's release into the community as a Level III Sex Offender would result in a high level of stress and that Brown has historically experienced difficulties while residing in the community. And the district court found that Brown would be returning to the same geographic area and support group in which he offended in the past.

With regard to the final *Linehan* factor, the evidence shows that Brown continued to commit sexual offenses despite his participation in sex-offender treatment. From June 1991 until July 1992, Brown was in a residential treatment program following his sexual

abuse of his sister. Brown's probation officer reported that Brown successfully completed this program. In 1996, Brown received counseling at the Southern Minnesota Health Center, but demonstrated little insight as to how his sexual and aggressive behavior affected others. Brown stopped attending counseling after his insurer declined to cover the expense, despite suggestions that he could apply for medical assistance or pay based on a sliding-fee scale.

After his burglary convictions, Brown entered treatment at CORE Psychological Services in July 1999. Brown completed relapse-prevention training in this program, but his treatment provider noted that he "seemed to have some trouble accepting the fact that he need[ed] to work through his issues in sex offender treatment" and opined that Brown's sexual issues were not completely resolved. Brown was terminated from the program in 2001 after admitting that he recently stole a pair of women's underwear and used it to masturbate. But the provider agreed to accept Brown back into the program after he experienced consequences for his illegal behavior and his current treatment debt was paid in full. Brown reentered the CORE program in 2002, and his assessor opined that Brown lacked significant remorse for his behavior and did not seem to grasp the impact that his abusive behaviors have on other people. He was terminated from the CORE program a second time in 2002 for violating his therapy agreement by consuming alcohol. A psychologist from CORE concluded that Brown may need to participate in sex-offender treatment in a prison setting because it was not safe for Brown to be in the community without 24-hour supervision.

In September 2003, Brown was admitted to the MSOP at MCF-ML. One of the assessment tools administered upon his admission indicated that he was dishonest regarding his interest in deviant sexual themes. Brown was terminated from the program in June 2004 for misrepresentation and for "falsely accusing a treatment participant and roommate of assault." Brown requested readmission to the program on at least three occasions in 2004. Brown reentered the MSOP in October 2005. Despite making "sporadic, slow progress in the . . . program," he was twice placed on probation within the program, once for "exhibiting a pattern and/or range of behaviors contradictory to promoting a positive attitude or environment," and a second time for failing to follow a self-imposed contract and lying to staff. In February 2006, Brown was terminated from MSOP based on inadequate participation. Brown requested readmission on at least two occasions in 2007, but his request was denied because he was being considered for civil commitment. In his report prepared for the commitment hearing, Dr. Riedel opined that Brown had difficulty in the treatment programs and as a result, "the prognosis for any type of treatment is poor."

To counter this evidence, Brown argues that the district court erred by finding that he was dangerous to others, citing *In re Schweninger*, where this court stated that

> absent a showing of violence, persons in the class of repetitive pedophiles cannot be committed as psychopathic personalities, unless shown to have committed *violent* acts in the past, and shown to have such an utter lack of power to control their behavior that they are likely to do so in the future.

520 N.W.2d 446, 450 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). But the evidence shows that Brown is not in "the class of repetitive pedophiles" and that his assaults *were* violent. Brown admitted that he hit B.B. and "threatened to beat her up if she told anyone about the abuse," and B.B. reported that Brown's assaults caused physical pain and injuries (i.e., bleeding). M.W. reported that Brown threatened to kill him if he told anyone about the sexual assault. Finally, Brown testified that he pushed A.N.W. to the ground and held her down during the sexual assault. The *Schweninger* "coercive pedophile" analysis does not apply where the offender did not rely purely on coercion, but also used physical force to restrain victims. *Preston*, 629 N.W.2d at 113.

Brown's reliance on *In re Robb*, 622 N.W.2d 564 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001), is similarly misplaced. In *Robb*, we held that limited restraint of a victim, which does not cause physical injury itself, is not the kind of violence contemplated by the SPP statute. 622 N.W.2d at 572. However, we have since stated that simply because an offender does not cause physical injury collateral to the assault itself does not mean that the assault was not violent within the meaning of the SPP statute. *Preston*, 629 N.W.2d at 113.

There is clear and convincing evidence that Brown has an utter lack of power to control his sexual impulses and as a result is dangerous to others. Because the district court correctly determined that Brown meets the standard for commitment as an SPP, we affirm Brown's commitment as an SPP.

II.

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
>
> (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" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." *Id.*, subd. 7a(a) (2008). It is not necessary to prove that the person to be committed has an inability to control his sexual impulses. *Id.*, subd. 18c(b). But the statute requires a showing 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*). The supreme court has construed the statutory phrase "likely to engage in acts of harmful sexual conduct" to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 190 (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.

Brown does not challenge the district court's findings on the first two prongs of the SDP analysis—engagement in a course of harmful sexual conduct and manifestation of a sexual, personality, or other mental disorder or dysfunction. But Brown argues that the evidence is insufficient to establish that he is highly likely to engage in acts of harmful sexual conduct in the future.

When examining whether an offender is highly likely to engage in acts of harmful sexual conduct, the district court considers the same six factors that are used to determine dangerousness under the SPP statute. *Linehan III*, 557 N.W.2d at 189 ("We conclude that the guidelines for dangerousness prediction in *Linehan I* apply to the SDP Act . . . ."). As discussed above, our analysis of the six *Linehan I* factors indicates that there is clear and convincing evidence that Brown is dangerous to others. Under this same analysis, there is clear and convincing evidence that Brown is highly likely to engage in acts of harmful sexual conduct. We therefore affirm the district court's order committing Brown as an SDP.

Affirmed.

Dated:

Judge Michelle A. Larkin