STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2176

In the Matter of the Civil Commitment of: Justin Casey Jacobson

Filed April 23, 2012
Affirmed
Connolly, Judge

Winona County District Court
File No. 85-PR-11-573

Samuel D. Jandt, Jandt Law Office, La Crescent, Minnesota (for appellant)

Lori Swanson, Attorney General, John Gross, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellant challenges his indeterminate commitment to the Minnesota Sex Offender Program as a sexually dangerous person. Because we conclude that there is sufficient evidence to support the commitment, we affirm.

FACTS

Appellant Justin Casey Jacobson is a 22-year-old man with a history of mental health issues, chemical dependency, and harmful sexual conduct. Appellant dropped out

of high school in 11th grade and has a limited work history at fast food restaurants and a candy store. At trial, appellant admitted to using both alcohol and marijuana. He also reported attempting suicide five times as a teenager and claimed being court ordered to take medication. From 2005 to 2007, appellant attended treatment at Hiawatha Valley Mental Health Center (HVMHC) for his suicide attempts, anger management problems, and chemical dependency issues. A psychologist diagnosed appellant with Axis I – Bipolar Disorder and ADHD. He completed 25 out-patient chemical dependency sessions but was ultimately discharged because he continued to use marijuana and did not attend aftercare.

In 2007, appellant was placed at Elmore Academy after being charged, in juvenile court, with a sex offense. While at the Academy, a psychologist from HVMHC completed an evaluation of appellant using the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A). Appellant's scores indicated he was agitated, depressed, and had poor impulse control. The psychologist diagnosed appellant with depressive disorder and ADHD.

On April 4, 2007, authorities admitted appellant to the Winona Youth Home. While there, a counselor suggested that appellant met the criteria to be diagnosed with Cannabis Abuse. Appellant reported that during 2007, he saw a psychologist for individual counseling at Family Services of Winona. The psychologist diagnosed him with depressive disorder, and as of December 2008, appellant continued to see a psychologist for individual therapy.

Appellant has sexually offended against at least ten female victims. His sexual offenses involved females varying in age from 12 to 16, and he met many of his victims at a youth center in Winona. He provided alcohol to five of his victims. He also committed a sex offense while under Extended Jurisdiction Juvenile (EJJ). At trial, appellant testified that the majority of his sexual history was with underage girls and eventually agreed that he was "maybe" sexually attracted to teenagers. The district court concluded that appellant had engaged in a course of harmful sexual conduct.

On May 13, 2006, when appellant was 16, he had sexual contact with 15-year-old L.M.E. Police interviewed L.M.E. the same day. L.M.E. stated that appellant accompanied her on a walk and that she followed him into an apartment building and sat next to him on a flight of stairs. She said that appellant started to kiss her and fondle her breasts under her shirt. She stated that she pulled away from appellant, but he held her down against the steps, unzipped her pants, and then digitally penetrated her vagina. At trial, appellant testified that any sexual contact between them was consensual. He further testified that he never forced himself on her. L.M.E. did not want the police to pursue charges, and the authorities took no further action. The district court found the official record credible and held that appellant committed the act of criminal sexual conduct in the fourth degree by clear and convincing evidence.

Also on May 13, 2006, police interviewed S.S.[1] S.S. reported to police that appellant sexually assaulted her earlier that day but did not elaborate because she did not

[1] The record does not indicate S.S.'s age.

want to pursue charges. The district court found the information in the official reports concerning, but found insufficient evidence to consider S.S. a victim.

During the summer of 2006, when appellant was 16, he sexually abused 13-year-old M.M.B. In an interview with police, M.M.B. stated that appellant tried to put his hand down her shorts while they were swimming, grabbed her breasts over her shirt, attempted to put his hand under her shirt, and attempted to kiss her on a later occasion. At trial, appellant testified that he was in a relationship with M.M.B. during that period of time and that any sexual contact between them was consensual. The district court found the official record credible and held that appellant committed the act of criminal sexual conduct in the fourth degree by clear and convincing evidence.

Also during the summer of 2006, when appellant was 16, he sexually abused 12-year-old B.J.B. In her police interview, B.J.B. stated that she dated appellant for a few weeks, and that appellant knew she was 12. B.J.B. told police that she did not want to do anything more than kiss appellant, but that he touched her vagina and breasts over her clothing on one occasion. B.J.B. stated that appellant made her feel uncomfortable and that she did not consent to the contact. At trial, appellant testified that any contact between them was consensual and that he respected B.J.B.'s boundaries. The district court found the official record credible and held that appellant committed the act of criminal sexual conduct in the fourth degree by clear and convincing evidence.

When appellant was 17, he sexually assaulted 16-year-old S.R.B. S.R.B., appellant's ex-girlfriend, told police she dated appellant for two months and broke up with him a few days before the alleged sexual assault. S.R.B. stated that she had

consensual sexual intercourse with appellant during their relationship, but that he "constantly" wanted to have sex, while she did not. She stated that appellant got mad and punched things when she would not have sex with him. S.R.B. stated that, on the day of the offense, she went to appellant's house. He followed her into the bathroom and exposed himself to her. Appellant then attempted to perform oral sex on her. S.R.B. told appellant "no," but he pinned her against the door and began engaging in sexual intercourse. She slapped him in the head, attempting to get him to stop. Appellant then pushed her to the ground and continued to sexually assault her.

After the incident with S.R.B., police interviewed appellant, who told them that even though he and S.R.B. were broken up, S.R.B. came over to his house to have sex. At trial, appellant testified that S.R.B. came to his house; that he had intercourse with S.R.B.; and that he never heard S.R.B. tell him to stop. At the commitment hearing, the district court found the official record credible and held that appellant committed the act of criminal sexual conduct in the third degree by clear and convincing evidence.

On February 5, 2007, the Winona County Attorney (WCA) filed a Juvenile Delinquency Petition alleging that appellant committed criminal sexual conduct in the third degree, and moved to certify appellant for adult prosecution. Appellant pleaded guilty, and in exchange for the plea, the WCA agreed to keep the matter in juvenile court and moved to designate him EJJ. Appellant also agreed to "completely and honestly" disclose his history of sexual abuse to a psychosexual evaluator. At the plea hearing, appellant stated that he understood he would be under court jurisdiction until he turned 21-years-old and that a violation could result in a prison sentence. He also testified that

he believed S.R.B. wanted to have sex with him but that he continued after she told him to stop.

On April 4, 2007, the court designated appellant EJJ and committed appellant to the Commissioner of Corrections for 54 months but stayed the adult prison sentence until his 21st birthday. The court placed appellant on probation and placed him at the Winona Youth Home to complete a sex offender program.

However, during the summer of 2007, when appellant was 17, he sexually abused three 13-year-old females, L.D., K.C., and K.M.F. L.D. told police that she engaged in a sexual relationship with appellant, that appellant was well aware that she was 13, and that appellant offered her alcohol on two occasions at his home. She also stated that appellant digitally penetrated her vagina on two occasions. Police also spoke with K.C., who told police that appellant was aware that she was 13; that she drank alcohol at appellant's home; and that appellant had sexual intercourse with her on three occasions. K.M.F. told police that appellant called her during the summer of 2007 to "hang out." She went to his house and brought her six-year-old sister. Appellant followed K.M.F. to the bathroom and began to undress her. K.M.F. told appellant "no," but he forced her to the floor, told her to shut up, covered her mouth, removed her pants, and forced his penis into her vagina. At trial, K.M.F. testified that she did not scream because she did not want to have her sister come into the bathroom and see what appellant was doing to her.

In February 2008, when appellant was 19, he sexually abused 14-year-old H.S. The police officer reported that "[H.S.] told us a couple of different stories concerning the alleged sex assault. [H.S.] clearly seemed to be deceptive and it appeared she was

nervous, scared, and frightened." H.S. told police that a member of the "Blood" gang sexually assaulted her, that she did not want to get into trouble, and that she had been told to keep her mouth shut. H.S. eventually reported to police that she and two of her friends, M. and C.Z., went to appellant's house on three occasions to hang out and that appellant provided them with alcohol. She stated that on one occasion, she went with appellant into the bathroom and they engaged in sexual intercourse. She also told police that appellant knew that she was 14-years-old. At the commitment hearing, she testified that after the assault, she became depressed and suicidal.

Police arrested appellant and conducted an interview. Appellant told police that he had consensual intercourse with H.S. and acknowledged that she was 13-years-old.[2] He also admitted to having sexual intercourse with M. and to digitally penetrating C.Z.'s vagina. He admitted to providing all three girls with alcohol and stated that he knew the girls were 13 and 14 before sexually abusing them, and that he did not mind the girls being underage even though he knew it was wrong. After speaking with appellant, police interviewed C.Z. C.Z. stated that appellant kissed her and fondled her, and then inserted his penis into her vagina. Police also interviewed M., who stated that she performed oral sex on appellant, at first willingly, but eventually had wanted to stop, but was forced to continue by appellant.

On March 6, 2008, the WCA charged appellant with five counts of criminal sexual conduct in the third degree for his offenses against H.S., C.Z., and M., in three separate criminal complaints. On November 18, 2008, the WCA filed a motion to amend the

[2] The record is inconsistent on whether H.S. was 13 or 14.

complaint related to C.Z. to charge one count of fourth-degree criminal sexual conduct. Appellant pleaded guilty to the amended count of criminal sexual conduct in the fourth degree, and the prosecutor dismissed the other charges. After he pleaded guilty, the court found appellant in violation of his EJJ probation, and the court committed him to the Commissioner of Corrections for 54 months.

On March 24, 2011, respondent Winona County filed a petition seeking to commit appellant as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). At the time, appellant was serving his sentence at the Minnesota Correctional Facility-Faribault (MCF-FRB). On March 29, 2011, the court issued an order that appellant be held at the Minnesota Sex Offender Program (MSOP) until the court issued an order committing or releasing appellant.

The court appointed two psychologists as court examiners: Dr. Andrea Lovett and Dr. Mary Kenning. Both psychologists supported appellant's commitment as an SDP, but not as an SPP. At trial, both doctors testified that appellant had engaged in a course of harmful sexual conduct, suffers from multiple disorders that cause him to lack adequate control over his sexually harmful behavior, is highly likely to engage in future acts of harmful sexual conduct, and is a danger to the community.

Dr. Lovett diagnosed appellant with Axis I—Paraphilia, NOS, non-consent; Cannabis Dependence, Alcohol Dependence; and Axis II—Antisocial Personality Disorder. She testified that appellant repeatedly targeted underage females and used overt force on occasion. In her report, she noted that "[Appellant's] statements suggested his focus on young adolescent females primarily stemmed from their vulnerability,

openness to sexual experience, and proneness to manipulation." She further testified that appellant interprets normal behaviors as sexual.

Dr. Lovett also testified that the combination of a Paraphilia, Antisocial Personality Disorder, and Psychopathy significantly increased appellant's risk for sexual re-offense and decreased his ability to control his sexually harmful behavior. She testified that he has no constraints on his behavior or consideration of others, which, combined with his sexual attraction to young girls, is associated with higher rates of recidivism. Dr. Lovett concluded that appellant's offense history, personality disorders, and frequency of sexual offenses showed that he lacked adequate control over his sexual impulses.

Dr. Kenning diagnosed appellant with Axis I—ADHD; Paraphilia, NOS, adolescent girls; Paraphilia, NOS, pornography; Sexual Disorder, NOS, hypersexuality; and Axis II—Reading Disorder; Disorder of Written Expression; and Personality Disorder, NOS, with Narcissistic and Antisocial Features. She testified that appellant had not transitioned to being sexually attracted to peer-age females, noting that appellant was sexually interested in 12- to 13-year-old girls and had sexual contact with more than one girl at a time. She further testified that appellant's disorders caused him to lack the ability to adequately control his sexually harmful behavior. Both doctors testified that appellant needed inpatient, long-term, group-based, intensive sex offender treatment.

The district court found the testimony of both doctors persuasive. After trial, the district court filed an Order for Initial Commitment, and committed appellant to the MSOP at St. Peter and Moose Lake as an SDP. After appellant's initial commitment,

MSOP conducted an evaluation and submitted its treatment report to the court. In the report, MSOP staff indicated that appellant continued to meet the commitment criteria as an SDP. Following a review hearing, the district court made appellant's commitment indeterminate. This appeal follows.

D E C I S I O N

In an appeal from civil commitment as an SDP, we review the district court's factual findings for clear error and the district court's determination of whether the statutory standard for commitment has been satisfied as a question of law subject to de novo review. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). A petition for civil commitment as an SDP must be proved by clear and convincing evidence. *Id.* We view the evidence in the light most favorable to the district court's conclusion. *Id.* at 840.

A "sexually dangerous person" 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(a) (2010). Appellant does not argue that he has not engaged in a course of harmful sexual conduct. Rather, appellant asserts that the evidence is insufficient to support his commitment as an SDP because (1) his history regarding sexual, personality, and mental disorders status does not support the district court's finding that he cannot adequately control his sexual impulses; (2) his history does not support the finding that he is "highly likely" to engage in harmful sexual

conduct in the future; and (3) the court's findings fail to support his commitment to the MSOP as the least restrictive alternative.

I. Control of Sexual Impulses

The second prong of the SDP definition requires proof of a sexual or personality disorder or dysfunction; this has been interpreted to mean that the proposed patient's disorder "'makes it difficult, if not impossible, for the person to control his dangerous behavior.'" *In re Linehan*, 594 N.W.2d 867, 875 (Minn. 1999) (*Linehan IV*) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 2080 (1997)). The Minnesota Supreme Court distinguished this from the grounds for commitment as an SPP, which requires proof of an utter lack of control of sexual impulses. *Linehan IV*, 594 N.W.2d at 875.

It is the district court's role to judge the credibility of witnesses. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). The appellate courts give due regard to the district court's opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01. When the court's findings of fact rest almost entirely on expert testimony, its evaluation of credibility is of particular significance. *In re Commitment of Janckila*, 657 N.W.2d 899, 904 (Minn. App. 2003).

Appellant does not contest the district court's conclusion that he manifests a sexual, personality, or other mental disorder or dysfunction. Instead, he argues that the district court erred in discounting his testimony at trial that he had control of his sexual urges and that his sexual contacts had all been consensual. However, the evidence in the record amply supports the district court's conclusion that appellant cannot adequately

control his sexual impulses. Both Dr. Lovett and Dr. Kenning diagnosed appellant with sexual deviances and personality disorders. They both testified that, as a result of these disorders, appellant lacks the ability to adequately control his sexually harmful behavior. The district court repeatedly found appellant's testimony not credible and specifically found the testimony of the expert witnesses, the psychologists who examined appellant, to be clear, credible, and persuasive. The district court did not err in finding the psychologists' testimony more credible than appellant's or in concluding that appellant lacked adequate control over his sexual impulses.

II. "Highly Likely" to Engage in Harmful Sexual Conduct

When considering the third factor in the SDP analysis, whether an offender is highly likely to re-offend, this court considers a number of factors, 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.

Stone, 711 N.W.2d at 840 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). Appellant argues that the factors regarding his demographic characteristics and base-rate statistics weigh against his commitment.

Both psychologists testified that appellant's demographic characteristics, namely his age and gender, increased his risk of re-offending. They also testified that appellant's low socio-economic status, unstable life, and history of working unskilled and

semiskilled jobs make him more likely to re-offend because he risks little by committing a crime. Appellant does not dispute any of this evidence, instead making generalized statements about his relationship with his family and his job history. Appellant has failed to show that the district court erred in its analysis of his demographic characteristics.

The district court concluded that appellant's base rate statistics indicated a heightened risk of re-offense. Clear and convincing evidence in the record supports the district court's conclusion. Both psychologists indicated that appellant is at greater risk to re-offend than other released offenders and is at higher risk for sexual re-offense than the average sex offender. Both psychologists performed actuarial testing on appellant, including the Violence Risk Appraisal Guide, Static-99R, Static-2002R, Minnesota Sex Offender Screening Tool-Revised, and Rapid Risk Assessment for Sex Offense Recidivism. Appellant's scores on all of the tests indicated a moderate-high to high risk for re-offense and recidivism.

Because clear and convincing evidence in the record supports the district court's findings relating to demographic characteristics and base rate statistics, and because appellant does not challenge the court's findings relating to any of the other *Linehan* factors, the district court did not err in concluding that appellant is "highly likely" to engage in harmful sexual conduct in the future.

III. Least Restrictive Alternative

Appellant argues that the district court's findings do not support his commitment to the MSOP as the least restrictive alternative. The district court found that appellant failed to demonstrate the availability and appropriateness of a less-restrictive alternative.

When a person is found to be an SDP under the Minnesota Commitment and Treatment Act, the district court must "commit the patient to the least restrictive treatment program . . . which can meet the patient's treatment needs" and must consider a range of treatment alternatives. Minn. Stat. § 253B.09, subd. 1(a) (2010). However, when the court finds that a person is sexually dangerous, "it *shall* commit the person to a secure treatment facility or to a treatment facility willing to accept the patient under commitment." Minn. Stat. § 253B.18, subd. 1(a) (2010) (emphasis added). Thus, the presumptive placement for an SDP is a secure treatment facility, i.e., MSOP.

The SDP patient has the burden to establish by clear and convincing evidence that a less-restrictive alternative is available. *Id.* This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d at 144. In considering treatment alternatives, a court may consider such factors as the need for security, whether the individual needs long-term treatment, and what type of treatment is required. *In re Pirkl*, 531 N.W.2d 902, 909 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995); *In re Bieganowski*, 520 N.W.2d 525, 531 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). Additionally, a district court does not err by rejecting a proposed alternative when the individual fails to prove that he or she was eligible for the out-patient program, that the program would accept him, or that there was a funding mechanism in place to pay for it. *In re Brown*, No. A07-593, 2007 WL 2367601, at *2-3 (Minn. App. Aug. 21, 2007).

The district court considered appellant's arguments regarding the availability of a less-restrictive alternative, but concluded that appellant had failed to prove that a less-

restrictive alternative was available and consistent with public safety. At trial, appellant testified that he had contacted the "Fresh Start" program in Winona regarding housing and securing employment, and that the program was aware of his status as a sex offender. He also testified that he was willing to participate in outpatient cannabis dependency and sex-offender treatment.

The district court properly concluded that appellant failed to show by clear and convincing evidence that a less-restrictive alternative program is available. Appellant did not provide evidence that he had been accepted into any outpatient sex-offender treatment programs. Moreover, both Dr. Kenning and Dr. Lovett testified that appellant needed inpatient treatment in a secure setting. Dr. Kenning testified that the only other inpatient residential program outside of the DOC is Alpha Human Services (Alpha House). There is no evidence in the record that appellant has been accepted to, or has the resources to fund, treatment at Alpha House. Moreover, Dr. Kenning testified that Alpha House would not be an appropriate placement for appellant due to his age and maturity level, and that the Alpha House is not a secure environment and is located in a residential neighborhood. And both psychologists testified that Alpha House would not interview or accept offenders who have been petitioned as SDP or SPP. Finally, both psychologists testified that the least-restrictive alternative and only option available for treating appellant consistent with appellant's needs and the need for public safety is the MSOP at Moose Lake and St. Peter. Therefore, the district court did not err when it concluded that

appellant failed to meet his burden of proving by clear and convincing evidence the existence of an adequate less-restrictive alternative.

Affirmed.