

*This opinion will be unpublished and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
A07-2271**

In the Matter of the Civil Commitment of:
Richard Arnold Bracken

**Filed May 6, 2008
Affirmed
Minge, Judge**

Redwood County District Court
File No. 64-PR-07-188

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

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, 445 Minnesota Street, 1800 Bremer Tower, St. Paul, MN 55101; and

Michelle Dietrich, Redwood County Attorney, Redwood County Courthouse, 250 South Jefferson, Redwood Falls, MN 56283 (for respondent)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP) claiming that (1) the district court should have instead committed him as a developmentally disabled person (DDP) under Minn. Stat. §§ 253B.02, subd. 14, .09, subd. 1 (2006); and (2) there was

insufficient evidence warranting his commitment as a SDP/SPP. Because we conclude that the district court did not err by denying appellant's request for DDP commitment and the evidence was sufficient to commit appellant as a SDP/SPP, we affirm.

FACTS

The material facts of this case are not disputed. Appellant Richard Arnold Bracken was initially committed to the Minnesota Sex Offender Treatment Program (MSOP) as a SDP and a SPP. At the initial commitment hearing, the district court considered the extensive record of Bracken's background, criminal conduct, antisocial behavior, history of treatment, and psychological reports. The district court's detailed factual findings recounted incidents in which Bracken pleaded guilty to criminal sexual conduct after sexually assaulting four female victims between the ages of four and seven in Mankato and Redwood Falls.

The district court also considered testimony from Dr. Gerald Henkel-Johnson and Dr. Thomas Alberg. Both doctors diagnosed Bracken with certain mental disorders. They stated that Bracken was impulsive, lacked customary standards of good judgment, failed to appreciate the consequences of his actions on victims, and continued to engage in a habitual course of harmful sexual conduct. Both doctors further testified that Bracken was highly likely to engage in acts of harmful sexual conduct in the future, represented a danger to others, and demonstrated an utter lack of power to control his sexual impulses. Drs. Henkel-Johnson and Alberg concluded that Bracken could not be safely released into the community and needed secure, in-patient sex offender treatment that could also address Bracken's lower intellectual functioning. Dr. Henkel-Johnson

testified that MSOP's facility in Moose Lake or St. Peter could best meet both the needs of Bracken and the community, although Dr. Alberg suggested that placement in the Minnesota Extended Treatment Options program (METO) could meet Bracken's needs as well.

The district court accepted the testimony of Drs. Henkel-Johnson and Alberg and ordered Bracken's initial commitment. The district court found clear and convincing evidence warranting Bracken's indeterminate commitment as both a SDP and SPP. The district court also concluded that Bracken failed to establish that a less-restrictive alternative to MSOP was available consistent with his treatment needs and the requirements of public safety. Following Bracken's initial commitment, the district court ordered MSOP to file a treatment report within 60 days. MSOP staff reported that Bracken needed sex offender treatment providing intensive treatment, observation, and supervision in a residential setting and concluded that MSOP was the only program currently available in Minnesota that could meet Bracken's needs. After the 60-day review hearing, the district court ordered Bracken's indeterminate commitment to MSOP. This appeal follows.

D E C I S I O N

When reviewing a judicial commitment, this court's review is limited to an examination of whether the district court complied with the Minnesota Treatment and Commitment Act (MTCA) 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; *see 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). “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).

I.

The first issue is whether the district court erred by denying Bracken’s request to be committed as a developmentally disabled person (DDP) under Minn. Stat. §§ 253B.02, subd. 14, .09, subd. 1 (2006). A DDP is defined as anyone:

(a) who has been diagnosed as having significantly subaverage intellectual functioning existing concurrently with demonstrated deficits in adaptive behavior and who manifests these conditions prior to the person’s 22nd birthday; and

(b) whose recent conduct is a result of a developmental disability and poses a substantial likelihood of physical harm to self or others in that there has been (i) a recent attempt or threat to physically harm self or others, or (ii) a failure and inability to obtain necessary food, clothing, shelter, safety, or medical care.

Minn. Stat. § 253B.02, subd. 14.

Bracken argues that he should be committed as a DDP because he has been diagnosed with “Borderline Intellectual Functioning,” because DDP commitment represents a less-restrictive alternative to commitment as a SDP/SPP, because the

continuing need for DDP commitment is reviewed more often, and because there are more opportunities to receive treatment in a community. Bracken asserts that, based on testimony by Dr. Alberg, he met the requirements for commitment as a DDP.

It does not appear that the district court erred by denying Bracken's request for commitment as a DDP. Bracken did not provide sufficient evidence that he fell within the plain-language definition of a DDP under section 253B.02, subdivision 14. Drs. Henkel-Johnson and Alberg presented conflicting testimony regarding Bracken's level of cognitive functioning and adaptive behavior. Using the Wechsler Adult Intelligence Scale, Bracken scored a verbal IQ of 64, a performance IQ of 85, and a full scale IQ of 71, but he also scored below 60 in two earlier Slosson IQ tests. In *In re Chey*, 374 N.W.2d 778, 779 (Minn. App. 1985), psychologists agreed that a diagnosis of mental retardation should be based on an IQ score of less than 70 and evidence of low-level adaptive functioning. Because the county had petitioned for a SDP/SPP commitment, neither doctor evaluated Bracken for possible DDP commitment. Although Dr. Alberg did not prefer using a rigid IQ of 70 on the Wechsler Scale and opined that Bracken could meet the criteria for DDP commitment based on his poor adaptive skills, Dr. Henkel-Johnson was unwilling to testify that Bracken met the statutory criteria for DDP commitment.

Notwithstanding Dr. Alberg's testimony that Bracken may have exhibited sufficiently subaverage intellectual functioning and adaptive skills to qualify for DDP commitment, Bracken presented no evidence that he manifested these conditions before his 22nd birthday as required by the statute. Bracken introduced early school records

indicating that he was held back one or two grades and graduated from high school later than his classmates. However, the school records contained no formal diagnosis of the conditions referenced in Minn. Stat. § 253B.02, subd. 14, and Bracken's first alleged sexual offense occurred when he was 29 years old. Moreover, Bracken presented no evidence that his "recent conduct" was the "result of a developmental disability." *See* Minn. Stat. § 253B.02, subd. 14(b). Accordingly, Bracken presented insufficient evidence that he met the definition of a DDP under section 253B.02, subdivision. 14.

Furthermore, after Redwood County filed the petition, the district court found clear and convincing evidence warranting Bracken's commitment as a SDP/SPP. As a result, the district court was required to commit Bracken to a secure treatment facility unless Bracken showed clear and convincing evidence that DDP commitment represented a viable, less-restrictive alternative that was consistent with both his treatment needs and the requirements of public safety. *See* Minn. Stat. § 253B.185, subd. 1 (2006). The district court heard evidence that MSOP has a special-needs program developed to treat offenders with lower cognitive functioning. Furthermore, Dr. Alberg acknowledged that he was not sure whether METO (a less-restrictive placement) would accept a level III sex offender. Bracken presented no evidence that he was eligible for admission into METO, that METO can treat patients with his particular needs, or that METO could provide sufficient security for the surrounding community.

Because Bracken failed to show that he met the requirements for DDP commitment under the plain language of Minn. Stat. § 253B.02, subd. 14, and because Bracken did not meet his burden of showing that METO presented a viable, less-

restrictive alternative to treatment by MSOP, we conclude that the district court committed no error by denying Bracken's request for DDP commitment.

II.

The second issue is whether there was clear and convincing evidence warranting Bracken's commitment as a SDP/SPP under Minn. Stat. § 253B.02, subds. 18b, 18c (2006).

A. SDP Commitment

A "sexually dangerous person" is defined as a person who "(1) has engaged in a course of harmful sexual conduct as defined in [Minn. Stat. § 253B.02, subd. 7a (2006)]; (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(a)(1)–(3). "Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." *Id.*, subd. 7a(a). "For purposes of [determining SDP status], it is not necessary to prove that the person has an inability to control the person's 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). The statutory phrase "likely to engage in acts of harmful sexual conduct" means that the person is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 179-80 (Minn. 1996), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999).

1. Course of Harmful Sexual Conduct

Both Drs. Henkel-Johnson and Alberg concluded that Bracken engaged in a habitual course of harmful sexual conduct over a period of many years based on Bracken's sexual abuse of four to seven children between the ages of four and seven under similar circumstances (Bracken was related to the children or considered a family friend by the parents). The doctors testified that Bracken's conduct would likely result in serious mental harm to the children. Dr. Henkel-Johnson testified that his diagnosis would not change if only the four Minnesota sexual assaults were considered.

2. Manifestation of Sexual, Personality, or Other Mental Disorder or Dysfunction

Using DSM-IV criteria, the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association, Dr. Henkel-Johnson diagnosed Bracken on Axis I with Pedophilia, Sexually Attracted to Females, Exclusive Type, Alcohol Abuse, and Cannabis Abuse. On Axis II, he diagnosed Bracken with Personality Disorder NOS (not otherwise specified) with avoidant, dependent, and antisocial features. Dr. Alberg reached a similar determination, with the exception that he diagnosed Bracken with Pedophilia, Both Male and Female, Nonexclusive, based on the allegation of Bracken's assault of a four-year-old boy in Kansas.¹

¹ The district court did not find clear and convincing evidence of the assault involving the young male in Kansas, but both experts testified that their overall diagnosis would not change if based solely on the four Minnesota assaults to which Bracken pleaded guilty.

3. *Whether Appellant is Highly Likely to Engage in Harmful Sexual Conduct*

Both experts used analytical models and considered the six factors outlined in *In re Linehan*, 518 N.W.2d 609 (Minn. 1994) (*Linehan I*),² before concluding that Bracken was highly likely to engage in acts of harmful sexual conduct in the future. The district court found the expert testimony that Bracken's past conduct, mental disorders, and risk of re-offending met the requirements for SDP commitment under the statute to be credible and persuasive.

Accordingly, based on uncontroverted evidence presented under each element of the SDP statute, we conclude that the district court did not err by finding that the state presented clear and convincing evidence warranting Bracken's commitment as a SDP.

B. SPP Commitment

A sexual psychopathic personality is statutorily defined 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. The statute requires that the district court find (1) a threshold condition; (2) a habitual course of misconduct; (3) an utter lack of power to

² In *Linehan I*, the supreme court considered relevant demographic characteristics, history of violence, base rate statistics for violent behavior among individuals with similar backgrounds, sources of stress in the environment, the similarity of the present or future context to those contexts in which a person has used violence in the past, and the person's record with respect to sex therapy programs. *Linehan I*, 518 N.W.2d at 614.

control sexual impulses; and (4) dangerousness. *Id.*; see also *Linehan I*, 518 N.W.2d at 613. “While excluding ‘mere sexual promiscuity,’ and ‘other forms of sexual delinquency,’ a psychopathic personality ‘is an identifiable and documentable violent sexually deviant condition or disorder.’” *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001) (quoting *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994)).

1. Emotional Instability; Impulsiveness; Lack of Customary Standards of Good Judgment; Failure to Appreciate Consequences of Personal Acts

Both experts found that Bracken exhibited at least three of the four alternate conditions considered under the SPP statute: impulsiveness of behavior, lack of customary standards of good judgment, and the failure to appreciate the consequences of personal acts. Dr. Henkel-Johnson wrote that Bracken exhibits a “significant lack of empathy” toward his victims. Dr. Alberg stated that Bracken fails to understand the consequences of his actions on victims and continually denies that he has committed certain offenses or caused harm.

2. Habitual Course of Misconduct

Dr. Henkel-Johnson testified that Bracken’s misconduct was habitual because the incidents followed a similar pattern over a number of years, and Dr. Alberg also noted that Bracken’s assaults have been similar, repeated, and Bracken has not stopped offending regardless of consequences.

3. Utter Lack of Power to Control Sexual Impulses

The district court heard extensive evidence concerning Bracken’s inability to control sexual impulses. Both doctors considered the six factors listed in *In re Blodgett*,

510 N.W.2d 910, 915 (Minn. 1994),³ before concluding that Bracken is unable to control his sexual impulses. The expert witnesses noted that Bracken cannot articulate a relapse prevention plan. See *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995). They also noted specific examples of Bracken's resort to grooming behavior toward his victims, an indication of an inability to control sexual impulses. See *In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994).

4. *Dangerousness*

As previously noted, both expert witnesses concluded that Bracken's past instances of sexual misconduct were harmful and that Bracken was highly likely to re-offend without treatment in a secure setting.

Based on the uncontroverted evidence presented under each element of the SPP statute, we conclude that the record contains clear and convincing evidence supporting Bracken's commitment as a SPP and that the district court did not err in its commitment determination.

Affirmed.

Dated:

³ *Blodgett* considered the nature and frequency of assaults; the degree of violence involved; the relationship between the offender and the victims; the offender's attitude and mood, the offender's family and medical history, and the results of psychological evaluation. *Blodgett*, 510 N.W.2d at 915.