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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-49**

In the Matter of the
Civil Commitment of:
Michael Dijon Pittman.

**Filed May 23, 2011
Affirmed
Klaphake, Judge**

Ramsey County District Court
File No. 62-MH-PR-08-594

Michael Dijon Pittman, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Stephen P. McLaughlin, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Michael Dijon Pittman was civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexual psychopathic personality (SPP) and a sexually dangerous person (SDP). Appellant sought review of his initial commitment, contending that the district court erred by denying his motion in limine that evidence of charges against him of indecent liberties with children from 1989 in Kansas be barred; appellant

argued that he was never found guilty of those charges and therefore that evidence should not have been admitted during the initial commitment proceeding. This court concluded that the Kansas evidence contained enough indicia of reliability to satisfy due process requirements and affirmed the district court's ruling. *In re Civil Commitment of Pittman*, A09-1931, 2010 WL 1541453 at *4 (Minn. App. Apr. 20, 2010), *review denied* (Minn. June 29, 2010).

Following this decision, the district court conducted a 60-day review hearing and issued its order indeterminately committing appellant to MSOP. Appellant challenges the district court's order, arguing that (1) the evidence is not sufficient to support indeterminate commitment; (2) MSOP is not the least restrictive alternative; and (3) he was denied his constitutional right to effective assistance of counsel.

Because the record evidence supports the district court's indeterminate commitment order; appellant did not sustain his burden of showing a less restrictive alternative to MSOP; and appellant's trial counsel was both a qualified and vigorous advocate, we affirm.

DECISION

I. Sufficient Evidence for Indeterminate Commitment

Appellant makes three challenges to the sufficiency of the evidence: (1) the evidence at the initial hearing was insufficient to support his commitment as SDP;¹

¹ Respondent Ramsey County argues that appellant is barred from addressing issues from his initial commitment because of the earlier appeal. The district court's ruling on appellant's motion in limine, which was the subject of the earlier appeal, is now the law of the case. *See In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 404 (Minn.

(2) examiner Dr. Rosemary Linderman, who testified at the initial hearing, was not a credible witness; and (3) the evidence at the review hearing was not sufficient to support appellant's indeterminate commitment.

A. *Initial Commitment as SDP*

We review the district court's findings on a petition for civil commitment for clear error and determine de novo as a question of law whether the findings satisfy the statutory standard for civil commitment. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). A "sexually dangerous person" is defined as one 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 (2010). "Harmful sexual conduct" includes "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another" and includes first-, second-, third-, and fourth-degree criminal sexual conduct. Minn. Stat. § 253B.02, subd. 7a (2010). "A course of harmful sexual conduct" is not defined by statute, but has been interpreted to mean a "succession" or "sequence" of conduct that includes harmful sexual acts. *Stone*, 711 N.W.2d at 837. A "course of harmful sexual conduct" can include both acts for which an offender was convicted and

App. 2001), *review denied* (Minn. Sept. 25, 2001). But Minn. Stat. § 253B.23, subd. 7 (2010) permits an "aggrieved party" to appeal from the order for initial commitment within 60 days after the order for indeterminate commitment. Thus, appellant may raise issues not decided in his earlier appeal, such as sufficiency of the evidence.

other acts that did not result in conviction. *Id.* Appellant argues that respondent did not establish a course of conduct.

The district court found that the following incidents of harmful sexual conduct occurred: (1) in 1989, while living in Kansas, appellant had sexual contact with three children, aged five, six, and seven; the incidents described fit the definition of second-degree criminal sexual conduct; (2) in 1995, appellant was charged with two counts of first-degree criminal sexual conduct with two seven-year old girls; a five-year old boy witnessed some of the assaults. Although appellant was charged only with two counts of first-degree criminal sexual conduct, the children described multiple contacts. Appellant pleaded guilty to one count of first-degree criminal sexual conduct; (3) in 1999, appellant forcibly anally raped another inmate while incarcerated and caused the inmate to suffer both a broken rib and a head injury; (4) two inmates at Moose Lake reported unwanted sexual contact by appellant in 2008 while appellant was participating in sex offender treatment.

Including witness statements, the evidence supporting the district court's findings of a course of conduct is clear and convincing. Appellant asserts that the Kansas evidence is not clear and convincing and should have been excluded, but this court previously determined that this evidence was credible and admissible. *See Pittman*, 2010 WL 1541453 at *4. The district court here also found that appellant was not credible in his denial of the conduct in Kansas. There is sufficient evidence of a course of harmful sexual conduct to support appellant's commitment as SDP.

B. Witness Credibility

Appellant challenges examiner Dr. Rosemary Linderman's credibility, asserting that she committed perjury during her 1985 marital dissolution proceeding. We defer to the district court's assessment of the credibility of expert witnesses. *See In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). Credibility issues may have arisen in 1985 during Dr. Linderman's dissolution hearing but appellant has not demonstrated that Dr. Linderman's testimony at the initial commitment hearing was not credible. Respondent notes that if appellant was convinced that Dr. Linderman was not credible in the initial hearing, he could have challenged her testimony by calling his own expert at the review hearing, but appellant waived his right to offer an independent medical opinion before the review hearing. The district court implicitly found Dr. Linderman credible when it noted that "Dr. Linderman's testimony at trial was consistent with her report and addenda filed with the Court."

C. Review Hearing Evidence

We review the district court's findings made at the 60-day review hearing for clear error and determine de novo if the findings support the district court's conclusion as to the need for indeterminate commitment. *See In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (discussing review hearing standards in a mental health commitment case).

The treatment facility must file a written treatment report within 60 days after the initial commitment. Minn. Stat. § 253B.18, subd. 2(a) (2010). The written report must address "the criteria for commitment and whether there has been any change in the [patient's] condition since the commitment hearing." Minn. Spec. R. Commit. & Treat.

Act 23(d) (2011). The report must also include information about the patient's diagnosis, present condition and behavior, an assessment of whether the patient continues to satisfy the conditions for commitment and the patient's prognosis, a discussion of treatment offered and the patient's response thereto, and an opinion as to whether the patient needs further treatment, which facility can provide appropriate treatment, and whether the patient is a danger to himself or the public. *Id.*

At the review hearing, the district court is limited to considering “(1) the statutorily required treatment report; (2) evidence of changes in the patient's condition since the initial commitment; and (3) such other evidence as in the district court's discretion enhances its assessment of whether the patient continues to meet statutory criteria for commitment.” *In re Linehan*, 557 N.W.2d 167, 171 (Minn. 1996), *vacated and remanded on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997).

Respondent submitted a 60-day treatment report, written by psychologist Dr. Gary Hertog, which covered the areas prescribed by the rule. Dr. Hertog opines that appellant needs long-term treatment at a secure facility; the only secure facility is the MSOP program at either Moose Lake or St. Peter because the other option, Alpha Human Services, does not accept offenders committed as SDP or SPP; and that appellant is a danger to the public with a high risk of further acts of harmful sexual conduct. Respondent also submitted a copy of a behavioral violation from June 29, 2010; appellant admitted during the hearing that he had had four violations in the space of seven months.

Before this hearing, appellant waived his right to an independent examiner as to his mental health. Appellant further refused to meet with his attorney prior to the hearing because he was working on a challenge to the diagnostic tests used in the initial hearing.

The district court's findings are based on record evidence and are not clearly erroneous; these findings support the district court's determination that appellant's condition has not changed since the initial commitment and that he meets the criteria for indefinite commitment.

Our review of the record leads us to conclude that the evidence is sufficient to support appellant's indeterminate civil commitment as SDP.²

II. Least Restrictive Alternative

Under the statutory civil commitment scheme, a patient is committed to a secure treatment facility unless the patient can establish by clear and convincing evidence that a less restrictive program is available that satisfies both the patient's treatment needs and public safety requirements. Minn. Stat. § 253B.185, subd. 1(d) (2010). Here, the district court concluded after the initial hearing that

[t]here is clear and convincing evidence that [appellant] must be confined to a secure setting for purposes of public safety and that MSOP-St. Peter and Moose Lake are the only entities that are able to meet these security needs. No treatment setting has been identified as better able to meet [appellant's] sex offender treatment needs consistent with the requirements of public safety.

² The district court also concluded that appellant was SPP but he has not challenged this designation. Even if this court were to agree that appellant is not SDP, his commitment as SPP would still support indeterminate civil commitment.

Although the court did not enumerate which findings support its conclusion, it made the following findings that support treatment in a secure setting: (1) appellant raped a fellow prisoner “while in the highest security setting of the prison”; (2) appellant made “poor progress in treatment, was intimidating to peers and quit treatment shortly after a polygraph report indicated that he was not being truthful about his sexual offending history”; (3) appellant reoffended after three years of outpatient treatment in 1989-92 and while on supervised release in 2005; (4) the warden at the Moose Lake Correctional Facility identified appellant as “one of the most difficult offenders that they have had in the program” and described appellant as “extremely angry” and “display[ing] significant anger when dealing with corrections staff”; (5) examiner Dr. Meyers concluded that “if [appellant] cannot behave in a controlled prison environment it is less likely he will behave in a safe manner in open society.”

Appellant has the burden of establishing by clear and convincing evidence that a less restrictive program can meet his needs and public safety concerns. *See In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). He suggested that he could check in with the Alpha program once a week and that he could talk with a religious leader. This does not meet the standard of clear and convincing evidence of a viable alternative.

III. Ineffective Assistance of Counsel

Appellant asserts that he was denied his right to effective assistance of counsel. “A patient has the right to be represented by counsel at any proceeding under [Chapter 253B]. The court shall appoint a qualified attorney to represent the proposed patient if

neither the proposed patient nor others provide counsel.” Minn. Stat. § 253B.07, subd. 2c (2010). The attorney is expected to “be a vigorous advocate on behalf of the patient.” *Id.*

We review the adequacy of counsel using the standards applied to criminal cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). “Representation is inadequate if counsel fails to exercise the diligence of a reasonably competent attorney under similar circumstances.” *Id.*

Appellant identifies the following as deficiencies in his representation: (1) appellant’s counsel objected, was overruled, yet failed to object to the overruling; (2) appellant’s counsel failed to “attack” the “heart of appellant’s liberty interest” during his direct and redirect examination and did not cite any case law that would help defend against indeterminate commitment; and (3) appellant’s counsel notified the court that appellant had been working on a motion to present to the court, but “never argued the contents of the evidence presented to the court, however, agreed with the court, and stated that the evidence would be evaluated.”

A person alleging ineffective assistance of counsel must show that counsel’s representation fell below an objective standard of reasonableness and that but for counsel’s errors, the outcome of the trial would have been different. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Generally, the reviewing court will not second-guess matters of trial strategy. *Id.* This includes decisions about which witnesses to call at trial and what information to present. *Id.* at 539.

Counsel's failure to object to the district court's ruling on her objection does not support an allegation of ineffective assistance of counsel; deciding which objections to make is a matter of trial strategy and, in this instance, court decorum.

Although counsel cited to no case during direct and redirect examination of appellant, she filed several trial briefs citing supporting law and appealed the district court's decision in limine to this court.

Finally, appellant did not provide counsel with his motion papers for the review hearing until the day of the review hearing and refused to meet with her in order to prepare for the hearing. Appellant's motion concerned the validity of the diagnostic tests administered by Dr. Linderman, but appellant also waived his right to an independent medical examiner, who might have provided testimony in support of his contention. In fact, counsel asked the court to keep the record open so that she could review the 100-150 pages of evidence provided by her client to determine if it was a valid motion. Counsel did not file any further motions with the court, which suggests that she felt the motion was not valid, again a matter of trial strategy. Under these circumstances, appellant has not sustained his burden of showing that his counsel was ineffective.

Affirmed.