STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1358

In the Matter of the Civil Commitment of: Jeffrey Patrick Guetter.

Filed January 5, 2010
Affirmed
Worke, Judge

Yellow Medicine County District Court
File No. 87-PR-08-582

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Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Huspeni, Judge.*

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

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

WORKE, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person and a sexual psychopathic personality, arguing that (1) his commitment was not supported by clear and convincing evidence, and (2) his rights to substantive and procedural due process have been violated. We affirm.

D E C I S I O N

Indeterminate Commitment

Appellant Jeffrey Patrick Guetter argues that he does not meet the statutory criteria for indeterminate commitment as a sexually dangerous person (SDP) or as a sexual psychopathic personality (SPP). The district court may civilly commit a person if the state proves the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2008). We will uphold the district court's findings of fact if they are not clearly erroneous. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). When findings of fact rest almost entirely on expert testimony, "the [district court's] evaluation of credibility is of particular significance." *Joelson*, 385 N.W.2d at 811. We defer to the district court's evaluation of witness credibility. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). And we will not reweigh the evidence. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 189 (Minn. 1996), *vacated on other grounds sub nom. Linehan v. Minn.*, 552 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand sub nom. In re Linehan (Linehan IV)*, 594 N.W.2d 867 (Minn. 1999). But whether the evidence is sufficient to demonstrate the statutory

requirements for civil commitment is a question of law subject to de novo review. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 613 (Minn. 1994); *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Appellant attempted to abduct four young girls, three at knifepoint, over a nine-day span in 2005. Appellant was charged with three counts of attempted false imprisonment, two counts of attempted kidnapping, one count of attempting to solicit a child to engage in sexual conduct, and one count of second-degree assault with a dangerous weapon—all felonies. Appellant pleaded guilty to two counts of attempted kidnapping and one count of attempted false imprisonment, and was committed to the Minnesota Commissioner of Corrections to serve his sentences concurrently.

The state petitioned for appellant's indeterminate commitment in June 2007 while he was serving his prison sentences. The state dismissed the petition when the first court-appointed examiner and the state's expert, Dr. Mary Kenning, did not support commitment. Appellant was released twice over the next two years, but both releases were revoked within weeks each time. The second revocation resulted from appellant's termination from sex-offender treatment program due to several reasons; appellant had an unexcused absence, quit the employment he had obtained, and confessed to masturbating to fantasies of young girls. The state filed a second commitment petition in July 2008 upon the expiration of appellant's full prison sentence.

At the initial commitment proceeding, the district court heard testimony from the first court-appointed independent examiner, Dr. Linda Marshall, the second court-appointed examiner, Dr. James Alsdurf, and the state's retained expert, Dr. Kenning, all

of whom supported appellant's commitment as an SDP because of his history of harmful conduct and high likelihood of reoffense. Drs. Alsdurf and Kenning also supported appellant's commitment as an SPP as well. Based largely on the experts' testimony, the district court issued an order for appellant's initial commitment to the Minnesota Sex Offender Program (MSOP) as an SDP and SPP. The MSOP filed a 60-day review, concluding that there was no new evidence to suggest that appellant was more capable of controlling his sexual urges or was less of a risk to the community than he was at the time of the initial commitment. Appellant was ordered indeterminately committed on May 28, 2009.

SDP Commitment

To support commitment as an SDP, the state must demonstrate by clear and convincing evidence that the person: (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) (2008). The state is not required to prove an inability to control sexual impulses, but must show that the person has an existing disorder or dysfunction that results in inadequate impulse control making it highly likely that the person will reoffend. *See id.*, subd. 18c(b) (2008) (stating that inability to control impulses is not required); *Linehan IV*, 594 N.W.2d at 876 (requiring a high likelihood of recidivism).

1. Habitual Course of Harmful Sexual Conduct

The district court concluded that appellant has engaged in a habitual pattern of harmful sexual conduct. Appellant argues that, under Minn. Stat. § 253B.02, subd. 7a

(2008), attempted crimes cannot be considered harmful sexual conduct. Appellant contends that the district court therefore wrongly accorded a rebuttable presumption in his case, and further that it is questionable whether he has ever engaged in a prior course of harmful sexual conduct.

Minn. Stat. § 253B.02, subd. 7a provides:

> (a) "Harmful sexual conduct" means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.
>
> (b) There is a rebuttable presumption that conduct described in the following provisions creates a substantial likelihood that a victim will suffer serious physical or emotional harm: . . . . If the conduct was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal, the presumption also applies to conduct described in . . . 609.25 (kidnapping), [and] 609.255 (false imprisonment).

The statute does not explicitly require convictions and has been consistently interpreted as allowing consideration of all harmful sexual conduct or behavior, not just criminal convictions. *See Ramey*, 648 N.W.2d at 268 (concluding "that the course of conduct need not consist solely of convictions but may also include conduct amounting to harmful sexual conduct[] [for] which the offender was not convicted").

The district court found there was

> [C]lear and convincing evidence that [appellant's] actions against [each of his victims] were either motivated by his sexual impulses and/or were part of [his] pattern of behavior that had criminal sexual conduct as a goal. Notwithstanding the presumption of harm, the court finds clear and convincing evidence that [appellant's] offense[s] against [his victims] w[ere] sexually harmful conduct and is the type of conduct

> that is substantially likely to cause serious emotional or physical harm to future victims.

Clearly the district court relied on appellant's sexual impulses and motivations underlying his attacks, not solely the statutorily created presumption of harm, and thus appellant's contention is unfounded. Accordingly, the district court did not err in concluding that appellant's four attempted kidnappings in a nine-day span and his underlying sexual impulses and motivations constituted a habitual pattern of harmful sexual conduct.

2. Likelihood of Reoffense

The Minnesota Supreme Court has set forth six factors to be considered in examining the likelihood of reoffense: (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 sex-therapy-program record. *Linehan I*, 518 N.W.2d at 614. Appellant argues that the state did not produce clear and convincing evidence that he was highly likely to reoffend. He focuses primarily on the base-rate statistics element in advancing this argument. According to appellant, his score of a "3" on the Static-99 actuarial tool indicates merely a "moderate" likelihood of reoffending, and this score precludes the court from determining by clear and convincing evidence that he is highly likely to reoffend.

However, the district court was readily aware of appellant's score on the Static-99 test. Both Drs. Marshall and Alsdurf considered several actuarial and clinical assessment tools when evaluating appellant. Dr. Alsdurf characterized the Static-99 test as unreliable in this case because it fails to consider deviant sexual practices and preferences, which are the strongest indicia for recidivism amongst sex offenders. The clinical tools utilized by both doctors, namely the Stable 2007 and the SVR-20 exams, indicated a high risk of appellant sexually reoffending. Furthermore, both doctors testified that appellant's pedophilia produced increased base-rate statistics for reoffense as did his substance-abuse issues, previous history of sexual deviance, and failure to complete sex-offender treatment. Accordingly, the record supports the district court's conclusion that the third *Linehan I* factor evidences a high likelihood of reoffense.

Moreover, appellant does not address the district court's reliance on the expert testimony of Drs. Marshall and Alsdurf pertaining to the other five *Linehan I* factors considered by the district court. The supreme court stated in *Linehan I* that none of these factors are more important than the others and stressed the importance of considering each factor, particularly when "there is a large gap of time between the petition for commitment and the appellant's last sexual misconduct." *Id.* Here, both court-appointed examiners testified that appellant's gender represented a demographic statistic supporting the likelihood of reoffense. Based on Dr. Alsdurf's testimony regarding appellant's history of violent behavior, the district court found that "[t]he fact that [appellant] tried to kidnap strangers, used a knife in [two] of the attempts, and knew [that] what he was doing was wrong all indicates [that appellant] is a high risk to reoffend and shows he was

willing to use more dangerous methods." Both doctors testified that appellant returning to the small town community where he committed the original offenses would create a concerning amount of stress in his environment, and further that his intent to return to the same community represented identical conditions to the situation where appellant used violence in the past. The court's overall determination that appellant meets the statutory requirements for an SDP commitment is supported by clear and convincing evidence.

SPP Commitment

To support commitment as an SPP, the state must demonstrate by clear and convincing evidence that the person exhibits (1) a habitual course of misconduct involving sexual matters, (2) an utter lack of power to control sexual impulses, and (3) dangerousness to others. Minn. Stat. § 253B.02, subd. 18b (2008); *Linehan I*, 518 N.W.2d at 613.

Appellant broadly contends that the district court erred in concluding that he meets the second condition because there is no clear and convincing evidence that he struggles to control his sexual impulses. Appellant argues that the record clearly indicates that his attempts to sexually engage with his victims were all rebuffed by the children, and that he always retreated after being told "No." Likewise, appellant claims that his sole sexual advance unrelated to his convictions was also easily rejected: he once asked a 12-year-old girl if he could hug and kiss her, and relented when she declined. Appellant also asserts that he is now asexual, although he provides no evidence to support this contention.

In considering the second element of an SPP analysis, the district court must weigh several significant 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 history and family; (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 it. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). The court relied primarily on Dr. Alsdurf's testimony in finding that appellant suffered from an utter lack of control over his sexual impulses; Dr. Marshall testified that appellant met many, but not all, of these requirements and did not support commitment as a SPP.

Dr. Alsdurf testified that the first factor evidenced appellant's utter lack of power to control his sexual urges as he tried to kidnap four children, three at knifepoint, in broad daylight during a nine-day span. He further noted that the nature of these offenses are violent by definition, in fulfillment of the second *Blodgett* factor. Dr. Alsdurf testified that all of appellant's victims were complete strangers and thus reflect a large pool of potential victims in satisfaction of the third factor. The district court relied on Dr. Marshall's testimony pertaining to appellant's dismissive attitude towards his offenses and tendency to minimize his involvement as support for the fourth factor. While the district court concluded that the fifth factor was not implicated in this case, the sixth factor was supported both by Dr. Marshall's and Dr. Alsdurf's diagnoses of pedophilia and personality disorder. The court finally concluded that "[a] careful consideration of the *Blodgett* factors indicates that [appellant] is unable to control his sexual impulses.

[Appellant] is a sexual predator who, given an available victim, available means, and available circumstances, is unable to control his sexual impulses."

The district court conducted a thorough analysis of the relevant *Blodgett* factors based upon testimony it found to be credible and reliable. The district court did not err in concluding that appellant suffers from an utter lack of power to control his sexual impulses. Accordingly, the district court's commitment of appellant as an SPP is supported by clear and convincing evidence.

Due-Process Challenges

Appellant makes two constitutional challenges to the district court's commitment order. First, he argues that the district court violated his rights to procedural due process by according a rebuttable presumption of harm under Minn. Stat. § 253B.02, subd. 7a based upon his convictions for attempted crimes. As discussed above, the district court permissibly considered appellant's underlying offenses notwithstanding the statutorily afforded rebuttable presumption. Appellant's first argument therefore fails.

Appellant next argues that his indeterminate commitment within the MSOP violates his right to substantive due process. The Minnesota Supreme Court has previously rejected substantive-due-process-challenges to both the SPP and SDP laws. The court has directly addressed the argument that indeterminate commitment is intended to incarcerate, rather than rehabilitate, stating that "even when [SPP] treatment is problematic, as it often is, the state's interest in the safety of others is no less legitimate and compelling. So long as civil commitment is programmed to provide treatment and periodic review, due process is provided." *Blodgett* 510 N.W.2d at 916. Similarly, the

court has held that Minnesota's SDP law does not violate substantive-due-process rights. *Linehan IV*, 594 N.W.2d at 873. Furthermore, this court recently held that a substantive-due-process challenge involving the right to treatment is premature at the time of indeterminate commitment. *In re Travis*, 767 N.W.2d 52, 67 (Minn. App. 2009). Accordingly, appellant's substantive due process challenge fails.

Affirmed.