STATE OF MINNESOTA
IN COURT OF APPEALS
A10-826

In the Matter of the Civil Commitment of:
Matthew Gregory Pengra.

Filed October 26, 2010
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. 62-MH-PR-09-306

Steven R. Kufus, Steven R. Kufus, P.A., Inc., St. Paul, Minnesota (for appellant)

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Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

SHUMAKER, Judge

In this appeal from an order for the civil commitment of appellant Matthew Pengra as a sexually dangerous person and sexual psychopathic personality under Minn. Stat. §§ 253B.02, subd. 18b-c, .185 (2008), Pengra challenges the district court's determinations that (1) his conduct constitutes a "course of harmful sexual conduct"

under the statute; (2) he qualifies as a sexual psychopathic personality under the statute; and (3) there were no less restrictive alternatives to commitment. We affirm.

FACTS

In this appeal, we are asked to decide whether the district court erred in ordering appellant Matthew Pengra's civil commitment to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP) under Minn. Stat. §§ 253B.02, subd. 18b-c, .185.

Pengra was incarcerated in prison on a criminal offense and was scheduled to be released on August 4, 2009. On June 25, 2009, the State of Minnesota filed a petition for Pengra's civil commitment as a sex offender. When Pengra first appeared in the district court on July 9, 2009, he waived his right to contest any hold that would be placed against his release from prison, and he agreed to be confined to MSOP pending the final decision on the state's petition. He also waived his right to an initial commitment hearing and agreed to remain in MSOP for evaluation under Minn. Stat. § 253B.18, subd. 2(a) (2008). He did, however, reserve his right to a de novo evidentiary hearing before a final determination on the state's petition would be made.

Thereafter, the district court conducted a three-day trial, at the conclusion of which Pengra and the state stipulated to the following facts:

Since 1991, Pengra has been charged with four incidents of lurking and peeping at women: On January 10, 1991, Pengra was charged with lurking with intent to peek, for looking in a window, watching a girl undress. On March 16, 1994, Pengra went into a women's locker room at a health club to watch women undress, and he pleaded guilty to

disorderly conduct for this offense. He later pleaded guilty to trespassing, because on September 17, 1994, he watched two women in a room from the window ledge of an apartment in the area around the University of Minnesota, which he chose because of its peeping opportunities. On February 17, 2005, Pengra looked through the blinds of a 19-year-old woman's bedroom. After the woman and her mother heard a tapping on the window, they called police, who found stolen electronic equipment, pornographic DVDs, drugs, and drug paraphernalia in Pengra's car. Pengra was charged with receiving stolen property and violating controlled substances law in the fifth degree.

Pengra also has committed various sexual assaults since 2003, all involving young Asian women on college campuses. On April 16, 2003, he lured a Japanese female student at the Minneapolis Community Technical College (MCTC) into a closed back stairway, where he then covered her mouth, and fondled her breasts under her shirt and her genitals over her underwear. The woman screamed and struggled against him. Pengra fled when a man opened the door to the stairwell landing. On April 22, 2004, Pengra followed another Asian female student into a study center at the University of Minnesota, sat down next to her, and asked her to go to his car to cuddle and play. She was uncomfortable, and a man in the study center asked Pengra to leave. After he left, several students wrote down Pengra's license plate number. There were no charges in this incident, but at the time it occurred, Pengra was on probation for domestic assault. The next day, on April 23, 2004, Pengra entered the apartment of a young Chinese woman by pretending he was looking for a place to rent. She told him to leave several times, and after ten minutes he left. The woman reported the incident to the police.

Pengra pleaded guilty to trespassing. During the commitment trial, he admitted that he had approached the Asian women hoping to have sex with them.

On July 8, 2006, Pengra committed two assaults on the University of Minnesota campus. Pengra had been up all night ingesting methamphetamine which, he testified, he used to heighten his sexual feelings as he searched for women to have sex with. In the early morning hours, Pengra followed a young Asian woman to her apartment, making comments about her butt, and slapping her on the butt. He fled when she screamed. Pengra was photographed by surveillance cameras. After that incident, he continued to wander around campus, using methamphetamine. In the afternoon, he followed a young Chinese woman into the laundry room of an apartment building. He pushed her to the floor, telling her that he wanted to touch her and have sex with her. While on top of her, he covered her mouth and put his hand on her genitals over her underwear. Pengra took out his penis and told her to touch it. She managed to escape. He then left the building. At the time of these two assaults, Pengra was on probation in several counties for several offenses.

On October 1, 2007, Pengra followed a Chinese graduate student into a University of Minnesota library. Pretending to help her find a book, Pengra led her up a stairwell that he knew had a secluded landing with a locked door. At the landing, he grabbed her arms, pulled her close to him, and covered her mouth. She broke free, screamed, and ran, stumbling down the stairs. He ran past her out of the building. A few days later, Pengra's probation officer recognized him from surveillance photographs and told police his identity.

On October 13, 2007, police apprehended Pengra, and he has been in some form of custody ever since. He pleaded guilty to fourth-degree criminal sexual conduct for the assault of the woman in the laundry room. Other charges, including fifth-degree criminal sexual conduct, false imprisonment, and failure to register as a predatory offender, were dismissed. He was required to register as a predatory offender.

Pengra has never received sex-offender treatment. The first time he was referred to human services for evaluation in 1994, he denied that his peeping offenses were sexually motivated, and, as a result, he was deemed not appropriate for treatment. In 2007, he was again referred to human services by his probation officer, but he was not considered a candidate for treatment in that residential program because of his history of violence, substance abuse and inadequate compliance with and adjustment to probation. At one point, Pengra was directed to complete sex-offender treatment through the program at the Moose Lake correctional facility, but he did not enter the program because his sentence was too short.

D E C I S I O N

If the state proves a petition for civil commitment of a person who is mentally ill and dangerous to the public by clear and convincing evidence, the district court may civilly commit the person under the Minnesota Commitment and Treatment Act (the Act). Minn. Stat. § 253B.18, subd. 1(a) (2008). On review, the role of this court is to examine the district court's compliance with the statute, and findings based on evidence presented at the hearing must justify the commitment. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). A reviewing court defers 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 this court reviews 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) (citing *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994)).

Course of harmful conduct

Minn. Stat. § 253B.02, subd. 18c, defines a "sexually dangerous person" as someone who has "engaged in a course of harmful sexual conduct as defined in subdivision 7a." Minn. Stat. § 253B.02, subd. 7a (2008), defines "harmful sexual conduct" as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." While the Act does not define what constitutes "a course" of harmful sexual conduct, the court of appeals has defined "course" as "a systematic or orderly succession; a sequence." *Ramey*, 648 N.W.2d at 268 (quotation omitted).

Pengra argues that the district court "incorrectly concluded that [he] engaged in a 'course' of harmful sexual conduct." He largely bases his assertions on the fact that the three expert psychologists who testified had "differing opinions" as to whether Pengra engaged in a course of harmful sexual conduct. But it is entirely within the district court's purview, as fact-finder, to evaluate the credibility of expert witnesses. *Rainforest Cafe, Inc. v. State of Wis. Inv. Bd.*, 677 N.W.2d 443, 451 (Minn. App. 2004). Additionally, "the opinions of expert witnesses are only advisory." *Id.* The mere fact that three experts had differing opinions on this issue does not mean that the evidence

does not support the conclusion that Pengra engaged in a course of harmful conduct. The district court's acceptance of one expert's testimony over another is a credibility determination. Furthermore, as discussed more fully below, there is ample evidence, beyond the testimony of the psychologists, to show that Pengra engaged in a course of harmful conduct.

Pengra argues that only the laundry room attack at MCTC, which resulted in a fourth-degree criminal sexual conduct conviction, is presumptively harmful. However, facts to which Pengra stipulated reveal that there are three instances of Pengra's sexual misconduct that are presumptively harmful under the Act. Those instances are (1) the July 8, 2006 incident that led to the fourth-degree criminal sexual conduct conviction (which, on appeal, Pengra agrees is presumptively harmful); (2) the October 1, 2007 incident that led to the false imprisonment conviction; and (3) the April 16, 2003 sexual assault at MCTC, which, though uncharged, violated criminal sexual conduct laws. The evidence adduced at trial established these facts.

There is a rebuttable statutory presumption that certain conduct, including criminal sexual conduct in the first, second, third, and fourth degrees, "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(b). Convictions of sexual conduct are not required. *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006) (citing *Ramey*, 648 N.W.2d at 268). The 2003 assault at MCTC meets the elements of fourth-degree criminal sexual conduct; thus, it falls under the statutory presumption of serious emotional and physical harm to a victim. *See* Minn. Stat. § 609.345, subd. 1(c) (2008)

(indicating that using force or coercion to accomplish sexual contact constitutes fourth-degree criminal sexual conduct); Minn. Stat. § 609.341, subd. 11(a)(iv) (2008) (indicating that touching the clothing "covering the immediate area of the intimate parts" is part of the definition of sexual contact). The 2007 incident is also presumptively harmful because it involved false imprisonment (for which Pengra was convicted) that was sexually motivated. *See* Minn. Stat. § 253B.02, subd. 7a(b); *Ramey*, 648 N.W.2d at 268 (concluding that conduct that forms the basis for other crimes (like false imprisonment) if sexually motivated also creates a rebuttable presumption). Pengra admitted at trial that this attack was sexually motivated. There is clear and convincing evidence to support the district court's finding that these three incidents were presumed harmful under the Act.

Pengra also asserts that the district court erred in relying on unpublished decisions of this court because they do not have precedential value. "Unpublished opinions of the court of appeals are not precedential"; however, they can be of persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). Further, published decisions of this court also support the propositions the district court attributed to these particular unpublished decisions. For instance, there is no set numeric value in determining "course of conduct." *See Ramey*, 648 N.W.2d at 267-68. Also, similarities among incidents may demonstrate a course of harmful sexual conduct. *See In re Bieganowski*, 520 N.W.2d 525, 529-30 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). And a course of harmful sexual conduct also may include harmful sexual conduct for which the offender was not convicted. *In re Commitment of Jackson*, 658 N.W.2d 219, 226 (Minn. App. 2003), *review denied* (Minn. May 20, 2003). Finally, the district

court cited three unpublished decisions that are factually similar to this case in order to highlight conduct of Pengra for which he was not convicted that this court has previously considered harmful sexual conduct; for example, sexually motivated window peeping, requesting sex, and touching women's breasts and buttocks without consent. The district court's reliance on unpublished decisions in this matter was not erroneous.

The district court further concluded that Pengra "has engaged in an escalating pattern of sexual misconduct that began with voyeuring, progressed to approaches and requests for sex, and culminated in planned sexual attacks where he lured his victims into isolated areas." The evidence clearly supports this conclusion. There is no magic number of incidents constituting a "course of conduct." *See Ramey*, 648 N.W.2d at 267-68. The three incidents that are presumptively harmful, without including the other incidents that may not, in isolation, have constituted harmful sexual conduct, are enough to support the conclusion that Pengra engaged in a course of harmful sexual conduct.

Sexual psychopathic personality

A "sexual psychopathic personality" means

> 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 evinced, 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 Minnesota Supreme Court in *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994), held that the psychopathic personality statute

(predecessor to the SPP statute) "identifies a volitional dysfunction which grossly impairs judgment and behavior with respect to the sex drive." The supreme court then set out a list of factors to consider in determining whether a person is a SPP, which included

> the nature and frequency of the sexual assaults, the degree of violence involved, the relationship (or lack thereof) between the offender and the victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and such other factors that bear on the predatory sex impulse and the lack of power to control it.

Id. When there is conflicting evidence "as to the existence of a psychopathic personality, the question is one of fact to be determined by the trial court upon all the evidence." *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984).

Pengra argues that the difference of opinion among the three expert psychologists cannot support the conclusion that he has exhibited a lack of power to control his impulses to support his commitment as a SPP under the Act. He specifically asserts that the statements in the report of Dr. Mary Kenning, a court-appointed psychologist, conflict with and contradict her trial testimony. This argument is without merit; Dr. Kenning's report and testimony are not entirely inconsistent. In her report evaluating the *Blodgett* factors, she states, as Pengra correctly points out, that "Pengra's conduct with the 2003, 2006 and 2007 victims . . . does not clearly show a lack of power to control his sexual impulses." However, she later concludes in this report that other factors, from *Blodgett* and other cases, do show that Pengra has a lack of power to control his sexual impulses.

Furthermore, the district court considered the *Blodgett* factors in concluding that Pengra exhibited an "utter lack of power to control" his sexual behavior that went far beyond the report and testimony of Dr. Kenning. For instance, the district court found that Pengra had allowed his image to be captured on surveillance cameras in order to "grope an Asian graduate student" when he had previously been caught on surveillance video engaging in sexual misconduct. Pengra was apprehended for his sexual misconduct, yet continued to commit acts of sexual misconduct while on probation and conditional release. Pengra admitted that his offenses escalated as he became "bored" with pornography and "sought higher levels of excitement." According to a report by Dr. Thomas Alberg, a court-appointed psychologist who was selected by Pengra, Pengra's personality test results indicate that he is "extremely self-centered, indifferent to social rules, alienated and uncomfortable with adult peers, and characterized by significant psychological issues," and thus Pengra is likely "impulsive, hedonistic and willing to exploit others." Pengra would cover the mouths of his victims and used considerable force in attacking them. He has refused sex-offender treatment in the past because he was unwilling to admit that his offenses were sexual in nature, and he has no relapse-prevention plan. The evidence strongly supports the district court's conclusion that Pengra has demonstrated an utter lack of control over his sexual impulses.

The district court did not err in granting the petition to commit Pengra as a sexual psychopathic personality under the Act.

Less restrictive alternative

Pengra argues that the district court erred in concluding that there exists no less restrictive alternative to commitment. He contends that he should be released under Intensive Supervised Release (ISR), and that the district court did not give adequate consideration to the ISR program as outlined in the stipulated facts. The law allows patients proposed for commitment as SDP or SPP the opportunity to show by clear and convincing evidence that there is an appropriate alternative to the state offender program "that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.18, subd. 1 (2008).

The district court made a detailed review of ISR as to the appropriateness of the treatment and the protection of the public and concluded that ISR is inappropriate for Pengra because he would only receive two hours of group sex-offender treatment each week on an outpatient basis. Dr. Kenning and Dr. Harry Hoberman, the state's expert psychologist, indicated that Pengra needs intensive inpatient sex-offender treatment. Further, Pengra had not completed chemical-dependency treatment as of the date of his trial, and there would be no funding for such under ISR. He also had failed to participate in numerous court-ordered treatment programs while he was not incarcerated. And under ISR, Pengra would be allowed to move about freely in the community with only a GPS device that would not effectively monitor his whereabouts. Finally, Pengra has virtually no history of compliance with court orders while on probation; furthermore, he committed sexual offenses while on probation.

Pengra makes the following specific assertions regarding ISR: (1) the district court did not give adequate consideration to the ISR treatment program described by Dr. Alberg; (2) the district court incorrectly found that Pengra would live with his brother or a friend; (3) the district court incorrectly concluded that there would be no funding for chemical-dependency treatment under ISR; (4) the district court incorrectly concluded that Dr. Kenning stated in her report that Pengra "needs intensive inpatient sex-offender treatment"; and (5) the district court incorrectly concluded that "ISR lasts only a year" and only provides housing for 60 days in a halfway house.

The record shows that Pengra's assertions are without merit. First, Dr. Alberg described the supervision he thought Pengra could receive, not what Pengra would actually receive under ISR. Dr. Alberg was not in court when the ISR agent explained the terms of supervision, and he admitted that he did not know the actual terms of ISR. Second, the stipulated facts indicate that the ISR terms are for 60 days at a halfway house, and the remainder at a living situation of Pengra's choosing. While the stipulated facts do not specify "brother or friend," they do indicate that Pengra would not live at a halfway house after 60 days, and he would choose where he lives. Third, the stipulated facts indicate that Pengra would be required to attend an AA-type group to help maintain his sobriety but would not receive funding for any other chemical-dependency or sex-offender treatment under ISR. Fourth, Dr. Kenning concluded in her report that there do not appear to be other treatment alternatives available to Pengra to meet his needs other than the MSOP-DHS program, which is inpatient. Dr. Kenning stated that Pengra requires a secure setting in order to complete his treatment and avoid chemical use. Fifth,

according to the stipulated facts and testimony of the ISR agent, ISR only lasts for a year and only provides 60 days in a halfway house, so the district court's finding is correct.

The district court did not err in determining that Pengra failed to show an appropriate less restrictive alternative to commitment.

Affirmed.