STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1034

In the Matter of the Civil Commitment of: William Oliver Busick.

Filed November 2, 2010
Affirmed
Stauber, Judge

Anoka County District Court
File No. 02PR0956

James S. Dahlquist, Minneapolis, Minnesota (for appellant)

Robert M.A. Johnson, Anoka County Attorney, Janice M. Allen, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

STAUBER, Judge

In this appeal from the district court's orders initially and indeterminately committing appellant William Oliver Busick as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), appellant argues that the district court erred by finding that petitioners proved SPP commitment criteria by clear and convincing evidence and erred by finding that the Minnesota Sex Offender Program (MSOP) is the appropriate and least-restrictive treatment program for appellant. Because the district court's findings are supported by clear and convincing evidence and because the district

court did not err in denying appellant's request for a less-restrictive alternative to commitment in MSOP, we affirm.

FACTS

Appellant, who was 61 years old when this civil-commitment petition was filed, has been convicted of offenses involving harmful sexual conduct on three separate occasions. His first offense occurred in 1970, at the age of 22, which led to him pleading guilty to contributing to the delinquency of a child (a misdemeanor), and sexual intercourse by a male over the age of 18 with a female child under the age of 16 (a felony). The record shows that between March and April of 1970, appellant had sexual intercourse with a 15-year-old female, B.M., on three to four separate occasions at his apartment in Birchwood, Wisconsin. Appellant also permitted teenagers to frequent his apartment any time they wished, provided them alcohol, and showed them pornographic pictures. Upon pleading guilty to both charges, appellant was committed to the Wisconsin State Department of Health and Social Services (DHSS) for a pre-sentence social, psychiatric, and physical examination. The Wisconsin court convicted appellant of both crimes, and he was placed on probation.

On several occasions, appellant denied that the Wisconsin conviction took place, and he has continually maintained that he was falsely accused. In 1997, appellant was asked about the incident during sentencing for his second conviction. Appellant told the judge that he was away fishing at the time, and that four teenage boys broke into his apartment, drank his beer, and "had a good time with [the victim], at my expense." He also told the judge that he was not convicted, but was put on probation. Appellant

continued to maintain that he was falsely accused as recently as his SPP/SDP interview with the Department of Corrections (DOC) in April 2008. He stated that five boys broke into his house and engaged in sexual intercourse with the 15-year-old girl, whom he referred to as the town "tramp."

Appellant's second conviction took place on May 5, 1997, in Hennepin County District Court. On that date, appellant pleaded guilty to criminal sexual conduct in the first degree. The victim was a six-year-old female who first reported to her step-grandfather that appellant, who was a family friend, had sexually assaulted her. The victim, W.M., was interviewed at Corner House where she reported that appellant put his "private" in her mouth on more than one occasion, and told her not to tell her mother because her mother would not love her anymore. The report from the interview with W.M. also indicated that appellant made W.M. watch pornographic movies, digitally penetrated her vagina, penetrated her vagina and anus with his penis, ejaculated on her belly, penetrated her vagina and anus with a vibrator and sexual aids, and performed oral sex on her. W.M. reported that the penetration hurt "bad." A medical examination of the victim was conducted with abnormal findings, consistent with the victim's interview. Investigators also found vibrators and sexual aids in appellant's bedroom, as well as pornographic material, consistent with the victim's interview.

In interviews with detectives, appellant shifted responsibility to the victim. He described W.M. as inquisitive and promiscuous. Appellant stated that W.M. found the sexual aids and used them herself, and that W.M. had initiated the sexual contact between them. In a court-ordered psychological evaluation, appellant stated that there was

"nothing I ever did to bring it on." The psychologist reported that "[t]his type of minimization and deflection of responsibility is rare at this stage of the criminal process." At his plea hearing, appellant did not admit to penetrating the victim. Instead, he presented a scenario in which the young girl sexually assaulted him. Twice the district court rejected appellant's plea because he failed to admit sufficient facts for the court to support the plea. After a third recitation of facts the district court accepted the plea. At sentencing, the judge stated that in her 13 years on the criminal bench, she "personally [had] never seen anyone as resistant as [appellant] to owning responsibility." Appellant was sentenced to 91 months plus five years of conditional supervision.

Appellant participated in a mandated Sex Offender Treatment Program while incarcerated at MCF Lino Lakes. However, he was terminated from the program for lack of progress and unwillingness to accept feedback. He was given the opportunity to reenter the program on three separate occasions, but refused. Upon his release, appellant completed an outpatient-treatment program with Alpha Human Services.

Appellant was released from prison on September 18, 2002, under the supervision of Hennepin County Corrections. While on supervised release, appellant moved to Anoka County and on September 10, 2005, a report was filed with the Centennial Lakes Police Department alleging that appellant had sexually assaulted a five-year-old neighbor girl, J.K. The sexual abuse was first reported after J.K.'s mother discovered her daughter with appellant in his garage. J.K. disclosed to her mother that she touches appellant's penis in the garage until it "squirts." J.K. was interviewed by detectives and reported that

she masturbated appellant's penis on multiple occasions, and that appellant touched her vagina area.

Appellant denied the allegations, telling detectives that J.K. got the idea of his penis squirting because she saw him urinating in a can in the garage. A complaint was filed in Anoka County District Court charging appellant with two counts of criminal sexual conduct in the second degree. On February 26, 2006, appellant pleaded guilty to one count in exchange for the state's agreement to dismiss count two. During the presentence investigation (PSI), appellant acknowledged that he was attracted to young girls, yet denied that he had allowed J.K. to touch his penis in the garage. He claimed that on a prior occasion, J.K. had simply walked into his apartment and touched his penis. During a court-ordered repeat-sex-offender assessment, appellant admitted to the evaluating psychiatrist that he allowed J.K. to touch his erect penis several times, and that she masturbated his penis once. He claimed she wanted to touch his penis more often but he would not let her. On May 4, 2006, appellant was sentenced to DOC custody for 36 months with 10 years conditional release. His supervised release date was scheduled for September 21, 2009.

Appellant has not admitted to any other instances of criminal sexual conduct for which he was not charged and convicted. However, the record contains evidence of other alleged instances of misconduct. Appellant reportedly lived with a woman and her teenage daughter during 1991. Appellant told a neighbor that the woman kicked him out because the teenage daughter made passes at him and wanted to have sex. Appellant testified at his civil-commitment trial that he did live with the woman and her daughter,

but denied being kicked out. In 1995, appellant was fired from his job of seven years due to claims of sexual harassment by a female coworker. Appellant claimed it was a misunderstanding and he was wrongfully terminated.

On January 30, 2009, respondent Anoka County filed a petition for civil commitment of appellant as an SDP and an SPP. The district court appointed Dr. Harlan James Gilbertson as first examiner, and Dr. Thomas Alberg as second examiner, requested by appellant. The civil commitment trial was held over two days. At the trial, both doctors opined in their testimony and reports that appellant meets the elements for commitment as an SDP. However, the doctors differed in their opinions as to whether appellant meets the elements for commitment as an SPP, with Dr. Alberg indicating that the elements of "habitual course of misconduct" and "utter lack of power to control" were not met.

On August 17, 2009, the court issued an order committing appellant to MSOP at Moose Lake as an SDP and an SPP. Following appellant's initial commitment, MSOP submitted a 60-day treatment report as required by Minn. Stat. § 253B.18, subd. 2 (2008). The report, authored by Dr. Anita Schlank, indicated that there had been no significant change that would lower appellant's risk. A review hearing was then conducted at which the court admitted into evidence the treatment report by Dr. Schlank and a report by Dr. Alberg. The court also heard testimony from Dr. Alberg and appellant. Dr. Alberg opined that appellant could be supervised and treated in the community, and respondent testified about his willingness to do so. Following the review hearing, the district court made appellant's commitment indeterminate. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence is insufficient to support the district court's conclusion that he satisfies the requirements for commitment as an SPP. Appellant does not challenge the district court's finding that he met the requirements for commitment as an SDP. This court reviews de novo whether the record contains clear and convincing evidence 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). The district court's findings of fact are reviewed under a clear error standard. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Further, "[w]here the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

A petitioner must prove by clear and convincing evidence that the standards for commitment as an SPP are met. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). The Minnesota Commitment and Treatment Act (the Act) defines an SPP 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 (2008). The district court must find: (1) a habitual course of misconduct involving sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness to others. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). The psychopathic personality excludes mere "sexual promiscuity" and other forms of "social delinquency." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). The personality "is an identifiable and documentable violent sexually deviant condition or disorder." *Id.*

A. Habitual course of misconduct

Dr. Alberg stated in his report and testified at trial that he did not find appellant's conduct to be habitual. His reasoning was that there were just three offenses, and the first one was much earlier and different in circumstance from the other two. The district court found Dr. Gilbertson's opinion to be more persuasive. Dr. Gilbertson testified that appellant's sex offending was habitual based on its sufficient frequency, similarity of behavior, similarity of victim, victim characteristics, and appellant's "continued defending in the presence of substantial consequences." There was also testimony showing habitual misconduct through appellant's pattern of grooming his victims leading to the sexual activity during both the 1995 and 2005 offenses. Appellant's history of offenses establishes a habitual course of misconduct.

B. Utter lack of power to control

In considering this element of the SPP analysis, courts must weigh several 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; and (6) the results of psychological and psychiatric testing and evaluation. *Blodgett*, 510 N.W.2d at 915.

The two examiners differed in their opinions as to whether this second prong was satisfied. Dr. Alberg testified that this standard was not met because appellant's offense history was not great enough. However, the district court again found Dr. Gilbertson's testimony that appellant met this prong to be more persuasive. This court defers to the district court's credibility determinations. *See Knops*, 536 N.W.2d at 620. The record contains sufficient evidence to support the district court's conclusion that appellant has an utter lack of power to control his sexual impulses. The record shows that when appellant had the opportunity, he sexually assaulted young females, the abuse occurred on a regular basis over an extended period of time, and that considering the age of the children, the nature of the abuse constituted violent behavior. Appellant was in a relationship of trust with his victims and their families, he groomed his victims over time, and he engaged in sexual behavior of increasing intensity over a period of months. Appellant's utter lack of control is demonstrated by his inability to control his grooming behavior or remove himself from the situations where he is likely to re-offend. *See In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994) (finding that offender's habit of grooming victims and failure to remove himself from similar situations showed utter lack of control), *review denied* (Minn. Oct. 27, 1994).

The record further shows that appellant has taken little responsibility for his actions. Both examiners agreed that appellant does not believe a problem existed. Up

until the recent trial, appellant blamed the five-and six-year old victims, claiming that they instigated the sexual contact. At trial, appellant admitted that he groomed his victims and initiated the contact; however the district court found that he still could not take responsibility for his behavior and does not have "a genuine understanding of his problem." The district court's conclusion that appellant has an utter lack of power to control his sexual impulses is supported by clear and convincing evidence.

C. Dangerousness to others

To determine whether an offender is dangerous to others under this third prong, the district court must consider six factors: (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. *Linehan I*, 518 N.W.2d at 614.

1. Demographic characteristics

Appellant has several demographic characteristics that moderate his dangerousness to others: He is 62 years old, has some education, and has a relatively stable employment history. However, there are also factors that indicate a high risk of re-offense. Appellant is male, and has a poor relationship history. Further, Dr. Gilbertson opined that appellant's age is not a factor reducing his sexual offending risk given his offense pattern, victim selection, and modus operandi. Dr. Gilbertson reported that age is not a mitigating factor because appellant's primary goal is not necessarily sexual

intercourse, but "the relational dynamics of engaging in ongoing sexual contact with his victims of increasing intensity due to his perception he is pleasing them."

2. History of violent behavior

Appellant argues that he has no history of violent behavior. Dr. Alberg stated in his report that appellant's history of violence is low because "he was molesting children and there is no violence necessary to molest a young child." However, this court has stated that "[i]t would be absurd to hold that because less force was needed to subdue an extremely young victim, the assault was non-violent." *In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001). The record contains evidence that appellant penetrated the six-year-old victim's vagina and anus. The victim reported to investigators that this hurt her "bad." There is evidence in the record that appellant used force against a victim to make her watch him masturbate. Appellant admitted that he grabbed the victim and kept her in his bathroom against her will, and that he "saw a look of fear in her eyes." Further, the record contains extensive testimony from Dr. Gilbertson about the long-term psychiatric damage that sexual abuse of young children, like appellant's last two victims, can cause. Clear and convincing evidence supports the district court's findings on this *Linehan* factor.

3. Base-rate statistics

Both examiners agreed that determination of base-rates for sex offending is difficult. One of the reasons for this is that sex offenses are significantly under-reported. Additionally, base-rates vary in the criteria for re-offense, which range from conviction, to charge, or admission. At any rate, Dr. Alberg testified that appellant's "likelihood of

re-offending is significantly higher than the base-rate established in Minnesota." Dr. Gilbertson testified that all of the actuarial instruments considered were consistent in placing appellant in a sex offender group who are at higher risk than the average released sexual offender. This factor supports the conclusion that appellant is likely to reoffend, and thus dangerous to others.

4. Sources of stress

The examiners agreed that appellant would have significant sources of stress in his environment. He would be labeled as a convicted sex offender, and would have difficulties with housing and employment. The district court also found that appellant does not have any support network of family or friends to assist him during stressful periods. The district court's finding that appellant has significant stresses in his environment that contribute to his risk of reoffending is supported by clear and convincing evidence.

5. Similarity of present or future contexts to past offense contexts

Appellant's environment would be similar to that in which he has offended in the past. There is no evidence in the record indicating that appellant's present or future circumstances would differ in any significant way from the circumstances in which he has found himself in the past when offending. This factor indicates a high likelihood of reoffense.

6. Sex-therapy programs

The record reflects that appellant has had repeated opportunities to participate in sex offender treatment, yet has failed to do so. He was terminated from one treatment

program for lack of progress and unwillingness to accept feedback, and he refused further treatment. Dr. Gilbertson testified that he considered appellant to be an untreated sex offender. Dr. Gilbertson reached this conclusion based on his observation that appellant is "devoid of any appreciation of his sexual offending cycle, clinically significant potential for relapse, as well as, the negative impact of his behavior on his victims."

In light of the totality of the evidence presented, the district court did not err in concluding that petitioner proved by clear and convincing evidence that the requirements for commitment as an SPP were met.

II.

When a person has been civilly committed as an SPP or an SDP, "[t]he court shall commit the patient to a secure treatment facility unless the patient establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.18, subd. 1(a). Minnesota law "does not require that commitments be made to the least-restrictive treatment program." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001) Under the Act, "patients have the *opportunity* to prove that a less-restrictive treatment program is available, but they do not have the *right* to be assigned to it." *Id.*

Appellant argues that he could be treated in the community in an outpatient program under the conditions of Intensive Supervised Release (ISR). He relies on the testimony of Dr. Alberg, who testified that he was in favor of something less than full commitment. Dr. Alberg stated that he believed appellant could be treated and

supervised in the community because his pattern of grooming victims takes time and could be discovered under supervision. However, Dr. Alberg conditioned his opinion on the availability of long-term intensive supervision and appropriate housing for appellant. Dr. Alberg acknowledged that appellant does not have a realistic plan for release, and did not know whether appellant could even be admitted to an outpatient treatment program. He also acknowledged that appellant reoffended in 2005 while on supervised release.

Dr. Gilbertson testified that there is no less restrictive option available other than placement at MSOP. He testified that the MSOP program embodies the "best practices" model for male sex offenders, it is residentially designed, and it utilizes a cognitive behavioral treatment modality. Dr. Gilbertson noted that the Alpha House, which Dr. Alberg had discussed as a possibility for appellant, only provides minimal security and would not accept a sex offender petitioned or committed as SDP or SPP. Considering the testimony of both examiners, appellant did not meet his burden of showing by clear and convincing evidence that a less restrictive treatment program is available.

Affirmed.