STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1413

In the Matter of the Civil Commitment of:
Timothy Cole Yepma.

Filed December 21, 2010
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-MH-PR-08-225

Brian C. Southwell, Minneapolis, Minnesota (for appellant Timothy Cole Yepma)

Susan Gaertner, Ramsey County Attorney, Melinda S. Elledge, Beth G. Sullivan, Assistant County Attorneys, St. Paul, Minnesota (for respondent Ramsey County)

Lori Swanson, Attorney General, Steven H. Alpert, Barbara Berg Windels, Assistant Attorneys General, St. Paul, Minnesota (for intervenor Minnesota Department of Human Services)

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

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

HALBROOKS, Judge

Appellant challenges the district court's order indeterminately committing him to the Minnesota Sex Offender Program as a sexually dangerous person (SDP). Appellant contends that the district court (1) abused its discretion by allowing respondent county's expert to submit a report into evidence and testify at trial and (2) erred by denying

appellant's request for an evidentiary hearing to demonstrate that the SDP provision of the Minnesota Commitment and Treatment Act, as administered, violates his state and federal constitutional rights. Because the district court did not abuse its discretion in making the disputed evidentiary ruling or err in rejecting appellant's constitutional challenge to the SDP law, we affirm.

FACTS

Between September 8, 2001, and July 22, 2002, appellant Timothy Cole Yepma committed six home-invasion sexual assaults upon five different women, all of whom lived in Ramsey County. Following his arrest, appellant pleaded guilty to six counts of criminal sexual conduct in the second degree and was sentenced to 108 months of incarceration and 20 years of probation. The sentencing court ordered appellant to complete sex-offender treatment either while in custody or upon release. When it became apparent that he would not complete the treatment program prior to his scheduled release date (July 30, 2008), appellant obtained permission to extend his incarceration for an additional 210 days to complete the program. Appellant nonetheless failed to complete the treatment prior to his postponed release date.

Prior to appellant's release, the Commissioner of Corrections (commissioner) recommended that respondent Ramsey County consider filing a petition to judicially commit appellant as an SDP or a sexual psychopathic personality (SPP). The county retained psychologist Peter Meyers, Psy.D., L.P., to assist in the petition decision. Dr. Meyers conducted a clinical interview and psychological assessment of appellant. Prior to the examination, Dr. Meyers (1) told appellant his interview statements would

not be protected by any doctor-patient privilege and that the resulting report would be given to the court and to both attorneys; (2) gave appellant a *Tennessen* warning and had him sign an informed consent for psychological testing; and (3) told appellant that he had a right to retain counsel prior to consenting to the interview, that he should not participate if he felt uncomfortable, and that there would be no adverse impact on appellant should he choose not to participate.

Dr. Meyers recommended that the county file a petition based upon his conclusion that appellant meets the statutory elements of an SDP who is highly likely to engage in future acts of harmful sexual conduct. The county subsequently petitioned for judicial commitment of appellant as an SPP and/or an SDP. Dr. Meyers's report was submitted with the petition.

Before trial, appellant moved to exclude Dr. Meyers's testimony and report, arguing that Dr. Meyers had in effect subjected appellant to an adverse expert examination without affording appellant the procedural protections mandated by Minn. R. Civ. P. 35. The district court denied the motion, reasoning that since rule 35's protections are not triggered until an action is commenced, and because no action had yet commenced at the time Dr. Meyers examined appellant, rule 35 did not apply.

At the beginning of trial, the parties stipulated that the only disputed issue was whether appellant met the third definitional criterion of an SDP, that is, whether he is highly likely to reoffend and engage in harmful sexual conduct. Meyers and two other experts testified during the eight-day trial. The district court concluded that appellant meets the definition of an SDP and that the only appropriate treatment is inpatient

treatment in the Minnesota Sex Offender Program. In a thorough 36-page opinion, the district court found, among other things, that appellant has a history of sexual deviancy and violent behavior that escalated from compulsive masturbating to pornography to window-peeping, to stalking his victims, to breaking into their homes while they were away, and finally to breaking into their homes when they were present and physically and sexually assaulting them. The district court specifically credited Dr. Meyers's opinion that appellant's sexual compulsion is so strong and ingrained that he will be unable to avoid future acts of harmful sexual conduct and that he is highly likely to reoffend. The district court filed the initial commitment order on January 7, 2010.

Following the initial commitment, appellant moved to dismiss the petition on the ground that the SDP statute, as administered, is punitive and criminal in nature and therefore violates his right to be free from double jeopardy under the United States and Minnesota Constitutions. On June 18, 2010, the district court ordered that appellant be indeterminately committed as an SDP.

On August 9, 2010, the district court issued an order denying appellant's motion to dismiss the petition on constitutional grounds. The district court, applying the analytic factors identified by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), and adopted by the Minnesota Supreme Court in *In re Linehan* (*Linehan IV*), 594 N.W.2d 867, 873 (Minn. 1999), concluded that appellant had failed to show that the SDP statute is administered in a manner so punitive in purpose or effect as to negate the legislature's intention to deem it civil. The district court further observed that appellant had failed to show that changes in the administration of the SDP

law since the ruling in *Linehan IV* justified rejecting that decision's authority. This appeal follows.

D E C I S I O N

I.

Appellant challenges the district court's admission of the testimony and report of Dr. Meyers. "A presumption of admissibility applies in commitment proceedings, and the district court has discretion to determine the admissibility of evidence." *In re Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007). The presumption effectively compels the admission of relevant evidence without consideration of its possible prejudicial effect or lack of foundation. *See* Minn. Stat. § 253B.08, subd. 7 (2010) (stating that a commitment court "shall admit all relevant evidence at the hearing"); Minn. Stat. § 645.44, subd. 16 (2010) (stating that "'[s]hall' is mandatory"); Minn. Spec. R. Commit. & Treat. Act 15 ("The Court may admit all relevant, reliable evidence, including but not limited to the respondent's medical records, without requiring foundation witnesses.").

Appellant first argues that Dr. Meyers's report violated procedural requirements applicable to prepetition screening reports filed pursuant to Minn. Stat. § 253B.07, subd. 1 (2010). But Dr. Meyers's report was not produced in the context of the prepetition screening process contemplated by Minn. Stat. § 253B.07, subd. 1; the report was actually requested pursuant to Minn. Stat. §§ 244.05, subd. 7(a), 253B.185, subd. 1 (2010), both of which explicitly address SDP and SPP petitions. Minn. Stat. § 244.05, subd. 7(a), requires the commissioner, prior to the release of an incarcerated individual

convicted of criminal sexual conduct and determined to be in a high risk category, to make a preliminary determination whether a petition under Minn. Stat. § 253B.185 may be appropriate based in part on a recommendation by a Minnesota Department of Corrections screening committee. Minn. Stat. § 253B.185, subd. 1, which specifically governs the procedure for SDP and SPP petitions, provides that upon receipt of the relevant facts from the commissioner concerning a potential commitment, and to assist him or her in deciding to file a petition, "[t]he county attorney *may* request a prepetition screening report" (emphasis added). The county attorney is therefore not obligated to request a prepetition screening report, s*ee* Minn. Stat. § 645.44, subd. 15 (2010) (stating that "'[m]ay' is permissive"), and, indeed, did not do so in this case. Because Dr. Meyers was not acting as a member of a section 253B.07, subdivision 1 screening team, he was not bound by the notice and procedural requirements set out in that statute.

Appellant next argues that Dr. Meyers's examination of appellant was an adverse expert examination under Minn. R. Civ. P. 35.01 that could not take place without a showing of good cause and a court order. *See* Minn. R. Civ. P. 35.01. But the rule, by its terms, only applies to existing actions: "In an action in which the physical or mental condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to . . . a physical [or] mental . . . examination by a suitably licensed or certified examiner." *Id.* Here, the absence of a pending action precludes the application of rule 35. It is true, as appellant observes, that under Minn. Stat. § 253B.07, subd. 2c (2010), "[a] patient has the right to be represented by counsel at any proceeding under this chapter," but appellant offers no support for the proposition that Dr. Meyers's

assessment constituted a "proceeding." The county retained Dr. Meyers to assist it in deciding whether to proceed to a petition, in anticipation of an adversarial proceeding.

Finally, appellant argues that Dr. Meyers's examination violated appellant's statutory and constitutional right to counsel. This argument is without merit.

As for the statutory right, Minn. Stat. § 253B.07, subd. 2c, provides that the patient's right to court-appointed counsel attaches "at the time a petition for commitment is filed." Dr. Meyers's examination took place before the petition was filed. Appellant presents no evidence to suggest a legislative intent to create a statutory right to counsel at the investigatory stage.

As for the constitutional right, the Sixth Amendment provides that in "all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. "A defendant's sixth amendment right to counsel attaches upon initiation of adversary judicial criminal proceedings." *State v. Ingold*, 450 N.W.2d 344, 347 (Minn. App. 1990), *review denied* (Minn. Mar. 8, 1990). But Minnesota courts have repeatedly held that the SDP act is facially civil and that civil-commitment proceedings, as well as any actions commenced by an individual as a challenge to his civil commitment, are not criminal proceedings. *See, e.g.*, *In re Linehan* (*Linehan III*), 557 N.W.2d 171, 189 (Minn. 1996), *vacated and remanded for reconsideration, Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand, Linehan IV*, 594 N.W.2d 867. The cases appellant cites in support of this argument involve criminal prosecutions and are thus inapposite.

As the county observes, it is common practice both for the petitioner in a commitment matter to retain an expert and for that expert to testify at trial, even when the expert participated in the prepetition review on the petitioner's behalf. *See, e.g., In re Martenies*, 350 N.W.2d 470, 471 (Minn. App. 1984) (observing that the senior clinical psychologist of the prepetition screening unit in an SPP commitment testified at trial), *review denied* (Minn. Sept. 12, 1984).

Finally, we note that appellant's assumption that the district court would have had no basis to commit appellant absent Dr. Meyers's testimony reflects a mischaracterization of both the district court's function as a finder of fact and the scope of this court's reviewing authority. It is true, as appellant argues, that Dr. Meyers was the only expert (of the three called) to opine that appellant was at a high risk to reoffend (the third criterion of the SDP analysis). But appellant points to no record evidence indicating that Dr. Meyers's testimony was the sole basis of the district court's conclusion or that the court could not have reached that conclusion without Dr. Meyers's testimony. Determining "[t]he weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder." *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005). Because we are without any legal basis to question the district court's weighing of the evidence and determination of whether it was helpful, the district court was free to credit, discredit, and weigh the expert testimony as it saw fit. Therefore, even assuming for the sake of argument that the district court did abuse its discretion in allowing Dr. Meyers to testify, appellant has not demonstrated, as he must, that the abuse of discretion was prejudicial to his case, given the many other bases upon

which the district court could have relied in reaching its conclusion. *See Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990) (stating that complaining party must demonstrate prejudicial error to obtain reversal on the ground of an improper evidentiary ruling). The district court did not abuse its discretion by admitting the report and testimony of Dr. Meyers into evidence.

II.

Appellant argues the district court erred by denying his request for an evidentiary hearing to demonstrate that the SDP statute is effectively punitive as administered and therefore violates his right to be free from double jeopardy under the United States and Minnesota Constitutions. We disagree.

Minnesota statutes are presumed constitutional, and "[the reviewing court's] power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). "Evaluating a statute's constitutionality is a question of law," which this court reviews de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

The supreme court upheld the constitutionality of the SDP statute in light of the double-jeopardy clause over a decade ago, in *Linehan IV*, 594 N.W.2d at 871-72. There, the supreme court interpreted the double-jeopardy issue in light of the United States Supreme Court's decision in *Hendricks*, in which the Supreme Court determined that a Kansas commitment law similar to the Minnesota law did not violate the prohibitions against double jeopardy or ex post facto laws. 521 U.S. at 369-71, 117 S. Ct. at 2085-86. In *Linehan IV*, the Minnesota Supreme Court concluded that the Minnesota law focuses

on treatment (not punishment), because a committed person can be released once sufficiently rehabilitated and in control of his or her sexual impulses. 594 N.W.2d at 871. Further, the purpose of the statute is not deterrence or retribution, which are the aims of criminal statutes. *Id.* Rather, the statute can be invoked only when a person is suffering from a mental or personality disorder that prevents him or her from exercising control over his or her behavior. *Id*. at 872. Civil commitment does not implicate double jeopardy because it is remedial, and its purpose is treatment rather than punishment. *Call v. Gomez*, 535 N.W.2d 312, 320 (Minn. 1995).

Appellant acknowledges that *Linehan IV* was correct when decided, but argues that changes in case law and the administration of the SDP act since *Linehan IV* have rendered the SDP law punitive and therefore violative of his right to be free of double jeopardy. In his memorandum in support of his motion to the district court, his argument on the motion, and his brief to this court, appellant asserts arguments under each of the six factors set forth in *Hendricks* and applied to determine whether a statute is punitive. The district court considered each argument carefully and concluded that appellant had failed to meet his burden of establishing the clearest level of proof that the SDP statute is being administered in such a way that is so punitive in purpose or effect as to negate the legislature's intention to deem it civil. The district court consequently denied the motion and acted properly in doing so. The arguments raised by appellant are either presented without any support, supported by selective or distorted readings of newspaper articles or state Executive Orders, premised on arguments that have been rejected by this court, or are logically untenable.

Appellant argues that the district court should have granted him his alternative requested relief in the form of an evidentiary hearing to prove that the SDP statute as applied is punitive. But he does not explain how an evidentiary hearing would enhance the merit of the arguments made in support of his motion or how an evidentiary hearing would allow him to present any evidence that he has heretofore been prevented from referencing to substantiate his position.

Affirmed.