STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1079

In The Matter of the Civil Commitment of:
Jeffrey David Holmgren a/k/a Jeffery David Holmgren.

Filed October 24, 2011
Affirmed
Stoneburner, Judge

Chisago County District Court
File No. 13PR0920

Jesse A. Johnson, Lindstrom, Minnesota (for appellant)

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

Janet Reiter, Chisago County Attorney, Anne Zimmerman, Assistant County Attorney, Center City, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

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

STONEBURNER, Judge

Appellant challenges the revocation of a stay of commitment as a sexually dangerous person, arguing that (1) the evidence does not support revocation of the stay; (2) he proved the availability of a less-restrictive alternative to commitment; and (3) the evidence admitted at the revocation hearing established that he no longer meets the statutory definition of a sexually dangerous person. Because the evidence supports

revocation, appellant did not establish the availability of a less-restrictive alternative, and the issue of whether appellant currently meets the statutory criteria for commitment as a sexually dangerous person is beyond the scope of the district court proceeding and this appeal, we affirm.

FACTS

In the spring of 2008, appellant Jeffrey David Holmgren, aka Jeffery David Holmgren was charged in Chisago County with one count of felony harassment and stalking and one count of gross-misdemeanor harassment and stalking. In September 2008, in connection with a prior conviction, and based on an extensive history of sexual offenses from 1995 through 2008, the Minnesota Department of Corrections assigned Holmgren a risk level of three. The matter was referred to the Chisago County Attorney's Office for consideration of Holmgren's civil commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP).

In 2009, under a plea agreement with Chisago County, Holmgren pleaded guilty to one count of felony harassment and stalking and was sentenced to a stayed prison sentence of 30 months. The stay was conditioned on 180 days in jail and five years of probation. Chisago County subsequently petitioned for Holmgren's commitment as a sexually dangerous person (SDP). Two court-appointed examiners concluded that Holmgren meets the criteria for commitment as a SDP. Both examiners recommended a stay of commitment, conditioned on outpatient sex-offender treatment and compliance with supervised probation in the criminal matter, as a less-restrictive alternative to commitment to a secure facility. Holmgren stipulated to the reports of the examiners. In

June 2009, the district court found that Holmgren meets the statutory definition of a SDP and issued an order committing Holmgren as a SDP. Based on an agreement of the parties approved by the district court, the district court stayed the commitment indefinitely.[1]

The stay was based on 16 conditions, four of which involved Holmgren's probation in the criminal matter. Condition a. required Holmgren to be on electronic home monitoring "for such term at the discretion of [Holmgren's] probation agent," and required Holmgren to submit a weekly schedule to his parole officer and abide by that schedule "unless otherwise modified as agreed by [Holmgren's] probation agent." Condition d. required that Holmgren's employment be approved by his probation agent. Condition e. required Holmgren to identify routes of travel from his residence to treatment, medical appointments and employment "as required by his probation agent." And condition j. required Holmgren's compliance with all conditions of probation imposed in the criminal file, which were incorporated into the commitment order by reference. The commitment order provided that "[i]n the event any material condition [of the stay of commitment] is substantially violated, and upon motion of [Chisago County] with personal service upon [Holmgren], the Court may issue its ex parte order committing [Holmgren] to the Minnesota Sex Offender Treatment Program at St. Peter, Minnesota or schedule a hearing." Holmgren did not appeal the commitment order.

[1] "Stayed orders for commitment as mentally ill and dangerous to the public, sexually dangerous person, or a sexual psychopathic personality may be issued only by agreement of the parties and approval by the court." Minn. Spec. R. Commit. & Treat. Act Rule 22 (2010).

After Holmgren's third probation violation, his probation was revoked, and his criminal sentence was executed. Holmgren's case manager at Chisago County Health and Human Services subsequently moved for revocation of the stay of commitment based on Holmgren's probation revocation. The district court granted Holmgren multiple continuances of the hearing on the revocation motion to allow him time to seek an appropriate less-restrictive alternative to commitment.

After the hearing, the district court revoked the stay of commitment, concluding that clear and convincing evidence proved that Holmgren materially violated a condition of his stay of commitment by failing to comply with requirements of his probation and no evidence was presented offering a less-restrictive alternative that would adequately meet Holmgren's needs and the requirements of public safety. Holmgren was committed to the Commissioner of Human Services as a SDP for placement in an appropriate secured facility for an indeterminate period of time. This appeal followed.

D E C I S I O N

I. The evidence supports the district court's findings that Holmgren materially violated the conditions of stayed commitment.

Holmgren first challenges the district court finding that clear and convincing evidence established that he materially violated a condition of his stay of commitment. An appellate court will not reverse a district court's "findings unless they are clearly erroneous." *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995).

Holmgren argues that his probation violations were "technical" and not "material." Holmgren equates civil commitment to incarceration, citing probation-revocation cases to

support his assertion that, in this case, "the policies favoring incarceration are vastly outweighed by policies favoring further supervision." But Holmgren fails to address the evidence in the record establishing that one of the most important factors in the original agreement of the parties and the approval of the district court to stay his commitment was the level of supervision Holmgren would have in the community during his five-year probation. Four conditions of the stayed commitment involved Holmgren's probation, compliance with which was plainly a material condition of the stayed commitment. The district court's finding that clear and convincing evidence demonstrated that Holmgren violated a material condition of the stay due to revocation of probation is not clearly erroneous.

II. The evidence supports the district court's finding that Holmgren presented no evidence of an available and appropriate less-restrictive alternative to commitment.

When reviewing whether a less-restrictive alternative can meet the patient's needs, "an appellate court will not reverse a district court's findings unless clearly erroneous." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). Holmgren does not dispute that he had the burden of demonstrating the availability and appropriateness of a less-restrictive alternative. *See* Minn. Stat. § 253B.185, subd. 1 (2010).

Dr. Reitman, one of the examiners in the commitment proceeding who recommended stayed commitment conditioned on out-patient treatment and supervision, testified at Holmgren's revocation hearing that outpatient treatment with supervision similar to the supervision Holmgren had on probation continued to be an appropriate less-restrictive alternative to commitment. Dr. Reitman noted that the original conditions of

the stay were effective because Holmgren had not reoffended sexually and GPS had quickly alerted Holmgren's probation supervisor to Holmgren's probation violations.

Holmgren's probation officer had daily contact with Holmgren, attended Holmgren's treatment meetings weekly, had weekly face-to-face contact with Holmgren, and monitored Holmgren through GPS. But Holmgren's mental-health case manager testified that he is not trained to supervise sex offenders, is not trained to monitor GPS, and is not able to have daily contact with Holmgren. And the record shows that the out-patient treatment program available to Holmgren is not able to supervise Holmgren in the community at all.

The district court agreed with Dr. Reitman that outpatient treatment coupled with GPS monitoring and an appropriate level of supervision in the community would constitute an appropriate alternative to commitment for Holmgren but found that Holmgren failed to meet his burden of proof to establish that any such program is available. The district court's finding that Holmgren failed to meet his burden of proof regarding the existence of a less-restrictive alternative that would meet Holmgren's needs and the requirements of public safety is not clearly erroneous.[2]

[2] Holmgren implies that he is entitled to a less-restrictive alternative and that one should be created for him. But "patients have the *opportunity* to prove that a less-restrictive treatment program is available . . . they do not have the *right* to be assigned to it." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). And there is no authority to support Holmgren's argument that, because it might be possible to create an appropriate supervision program, he is entitled to such a program.

III. Holmgren's assertion that he no longer meets the definition of a SDP is beyond the scope of the proceedings in district court and this appeal.

For the first time on appeal, Holmgren asserts that the evidence at the revocation hearing established that he does not currently meet the statutory definition of a sexually dangerous person. *See Thiele v. Stich*, 425 N.W.2d, 580, 582 (Minn. 1988) (stating that generally an appellate court will not consider matters not argued to and considered by the district court). We decline to address this issue, other than to note that a person who has been committed as a SDP cannot petition the district court for an order holding that he is no longer in need of commitment. *See* Minn. Stat. § 523B.17, subd. 1 (2010) (excluding a person committed as a SDP from the category of persons who may petition the district court for an order that he is no longer in need of commitment).[3] For this reason, Holmgren's assertion that he no longer meets the criteria for commitment as a SDP is not within the scope of the revocation proceedings before the district court or this appeal.

Affirmed.

[3] Minn. Stat. §§ 253B.18, subd. 15 and 253B.185, subd. 18 (2010), provide that a person committed as a SDP may file a petition for reduction in custody with a special review board.