STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1211

In the Matter of the Civil Commitment of: Anthony Christopher Cooper

Filed November 18, 2013
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-PR-12-8109

Ashley M. Kuhn, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for appellant)

Mark A. Ostrem, Olmsted County Attorney, Geoffrey A. Hjerleid, Jennifer D. Plante, Assistant County Attorneys, Rochester, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

LARKIN, Judge

Appellant challenges his commitment to the Minnesota sex offender program (MSOP) as a sexually dangerous person (SDP), arguing that he does not meet the statutory criteria for commitment as an SDP and that a less-restrictive treatment program is available. Because appellant's commitment as an SDP is supported by clear and convincing evidence and because appellant failed to establish the availability of an appropriate, less-restrictive treatment program, we affirm.

FACTS

In 1994, appellant Anthony Christopher Cooper sexually assaulted a 13-year-old girl in Missouri. Cooper forced the child to have sexual intercourse after luring her to a basement laundry room. Cooper also vaginally penetrated the child with his fingers. Cooper pleaded guilty to felony-level rape and sodomy. He was placed on probation, violated the terms of his probation, and was sent to prison. Cooper claims that he successfully completed sex-offender treatment while in prison in Missouri, but the record does not contain documentation that supports his claim.

In approximately 2002, after moving to Rochester, Cooper digitally penetrated S.B., the nine-year-old child of his girlfriend, on at least two separate occasions. Cooper threatened S.B. to prevent her from reporting the abuse.

In January 2003, Cooper approached L.T.W., an 11-year-old girl, and offered her $10 if she would engage in sexual intercourse with him and his friends. Cooper gave L.T.W. $3, and she reported the incident to her parents. L.T.W.'s father reported that prior to soliciting sexual relations from L.T.W., Cooper had visited the family's home and asked him when he would allow L.T.W. to date. Cooper pleaded guilty to felony-level solicitation of a child to engage in sexual conduct. The district court granted Cooper's motion for a dispositional departure, stayed execution of the presumptive 20-month prison term, ordered Cooper to serve six months in jail with credit for time served, and placed Cooper on probation.

In June 2005, while awaiting sentencing for his offense against L.T.W., Cooper sexually abused J.L.H., his then girlfriend's 15-year-old, physically disabled niece. The

abuse involved multiple acts of fondling, digital penetration, and sexual intercourse; it occurred while Cooper assisted in the physical care of the child. Cooper threatened to kill J.L.H. and her mother if J.L.H. reported the abuse.

In 2006, Cooper was evicted from his residence and involuntarily terminated from outpatient sex-offender treatment because he had begun a relationship against program rules and had engaged in voyeuristic behavior. At the time of his discharge from treatment, he had only marginally progressed in the program.

S.B. and J.L.H. each reported Cooper's sexual abuse to law enforcement in 2006. In July 2007, Cooper pleaded guilty to two counts of second-degree criminal sexual conduct relating to S.B. and J.L.H.

In December 2012, respondent Olmsted County petitioned the district court to civilly commit Cooper as a sexually dangerous person (SDP). The district court held a hearing on the county's petition, at which Cooper and Dr. Paul M. Reitman testified. Dr. Reitman's report was also admitted into evidence. Dr. Reitman diagnosed Cooper with paraphilia, not otherwise specified; dysthymia; anxiety disorder; and antisocial personality disorder. Dr. Reitman opined that Cooper has engaged in a course of harmful sexual conduct, is unable to adequately control his sexual impulses, and is highly likely to engage in future acts of harmful sexual conduct. Dr. Reitman therefore opined that Cooper meets the statutory criteria for an SDP and recommended that Cooper be civilly committed to a secure treatment facility. The district court committed Cooper to the MSOP for an indeterminate period of time. This appeal follows.

D E C I S I O N

I.

Cooper argues that the evidence does not establish that he meets the standard for commitment as an SDP. To commit, the district court must find by clear and convincing evidence that a person is an SDP. 2013 Minn. Laws ch. 49, § 7, at 214 (to be codified at Minn. Stat. § 253D.07, subd. 3 (Supp. 2013)). On review, we defer 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). "Where 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). But we review de novo "whether there is clear and convincing evidence in the record to support the district court's conclusion that [the proposed patient] meets the standard[] for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

A person may be committed as an SDP if 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. 2013 Minn. Laws ch. 49, § 22, at 229 (recodifying Minn. Stat. § 253B.02, subd. 18c (2012) as Minn. Stat. § 253D.02, subd. 12 (Supp. 2013)). "Harmful sexual conduct" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." 2013 Minn. Laws ch. 49, § 22, at 229 (recodifying Minn. Stat. § 253B.02, subd. 7a (2012) as Minn. Stat. § 253D.02, subd. 7 (Supp. 2013)). It is

not necessary to prove that the person has an inability to control his sexual impulses. 2013 Minn. Laws ch. 49, § 22, at 229 (recodifying Minn. Stat. § 253B.02, subd. 18c as Minn. Stat. § 253D.02, subd. 12 (Supp. 2013). But the statute requires a showing that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*). The supreme court has construed the statutory phrase "likely to engage in acts of harmful sexual conduct" to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 190 (Minn. 1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999).

Course of Harmful Sexual Conduct

Cooper argues that "[t]he district court erred in finding that [the county] proved by clear and convincing evidence that [he] engaged in a course of harmful sexual conduct" because "there is insufficient evidence in the trial record to support the [d]istrict [c]ourt's finding relative to this prong of the statutory criteria." Cooper's argument is twofold. First, he argues that he "testified that he disputes [that] this element was met." But the district court explicitly discredited Cooper's testimony "as to the history of his engaging in harmful sexual conduct." The district court's credibility determination was based on its careful and thorough review of Cooper's pattern of admitting and then denying his sexual conduct. For instance, during Cooper's clinical interview with Dr. Reitman, he admitted that he had engaged in a course of harmful sexual conduct. But during his trial testimony, Cooper disagreed with Dr. Reitman regarding this factor. We defer to the

district court's credibility determination. *See Ramey*, 648 N.W.2d at 269 ("Deference is given to the district court's opportunity to judge the credibility of witnesses.").

Second, Cooper argues that because "one of the offenses is almost twenty years old . . . it is not relevant based upon its age." But acts of harmful sexual conduct need not have occurred recently to be considered part of a course of harmful sexual conduct. *See In re Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007) ("Incidents establishing a course of harmful sexual conduct need not be recent and are not limited to those that resulted in a criminal conviction."), *review denied* (Minn. Sept. 26, 2007). Rather, "[b]ecause the statute considers a course of conduct, the incidents that establish the course will have occurred over a period of time and need not be recent." *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Thus, the district court appropriately considered the 1994 conviction.

We nonetheless observe that the evidence is sufficient to support the district court's course-of-harmful-sexual-conduct finding even without the 1994 offense. A course of harmful sexual conduct is not defined by a set numeric value; instead, "course is defined, using its ordinary meaning, as a systematic or orderly succession; a sequence." *Ramey*, 648 N.W.2d at 268 (quotation omitted). It is undisputed that Cooper has two convictions for second-degree criminal sexual conduct and one conviction for solicitation of a child to engage in sexual conduct, in addition to his 1994 offense and resulting conviction. There is a rebuttable statutory presumption that second-degree criminal sexual conduct constitutes harmful sexual conduct. 2013 Minn. Laws ch. 49, § 22, at 229 (recodifying Minn. Stat. § 253B.02, subd. 7a (2012) as Minn. Stat. § 253D.02, subd. 7

(Supp. 2013)). Cooper did not rebut the presumption. Moreover, the district court determined that independent of the statutory presumption, there was clear and convincing evidence that each of Cooper's convictions constituted harmful sexual conduct, and Cooper does not challenge the relevant findings on appeal. Instead, Cooper encourages this court to substitute its judgment for that of the district court. But appellate courts "will not weigh the evidence." *Linehan III*, 557 N.W.2d at 189. In sum, the district court did not err by finding that Cooper has engaged in a course of harmful sexual conduct.

Sexual, Personality, or other Mental Disorder or Dysfunction

Cooper argues that "[t]here is insufficient evidence in the trial record to support the [d]istrict [c]ourt's finding" that the county "proved by clear and convincing evidence that [he] manifests a sexual, personality, or other mental disorder or dysfunction that makes him unable to adequately control his urges."

In *Linehan IV*, the Minnesota Supreme Court "narrowly construed the SDP statute so as to require a showing of future dangerousness linked with an existing mental disorder making it 'difficult, if not impossible, for the person to control his dangerous behavior.'" *In re Martinelli*, 649 N.W.2d 886, 888 (Minn. App. 2002) (quoting *Linehan IV*, 594 N.W.2d at 875), *review denied* (Minn. Oct. 29, 2002). "The *Linehan IV* court also stated that the SDP statute allowed commitment of those whose disorder did not 'allow them to adequately control their sexual impulses.'" *Id*. at 889 (quoting *Linehan IV*, 594 N.W.2d at 876). This court subsequently held that "there [must] be a finding of 'lack of control' of sexual conduct, based on expert opinion tying that 'lack of control' to

a diagnosed mental abnormality or personality disorder, before a person may be committed as a sexually dangerous person." *Id*. at 887.

In 2005, a psychosexual examiner diagnosed Cooper with paraphilia, not otherwise specified, and antisocial personality disorder. More recently, Dr. Reitman diagnosed Cooper with paraphilia, not otherwise specified; dysthymia; anxiety disorder; and antisocial personality disorder. And Dr. Reitman concluded that Cooper is unable to adequately control his sexual impulses. During his clinical interview with Dr. Reitman, Cooper demonstrated no insight into his sexual cycle, his grooming techniques, his arousal to violence, his need for domination, or his excitement at the anticipation of rape.

Cooper "disputes each diagnoses" of Dr. Reitman. In doing so, Cooper relies solely on his trial testimony. For example, he cites his trial testimony and argues that "the record reflects that [he] clarified he is not aroused by children and does not think about having sexual intercourse with children or touching them sexually[,] . . . the idea of rape and/or domination does not arouse him [, and] . . . he can control himself because he knows what is wrong and he does not want to get into further trouble." The district court recognized that Cooper disagreed with Dr. Reitman's opinion that Cooper is unable to adequately control his sexual impulses, but it found Dr. Reitman credible. This court defers to the district court's credibility determination. *See Ramey*, 648 N.W.2d at 269 ("Deference is given to the district court's opportunity to judge the credibility of witnesses."); *see also Knops*, 536 N.W.2d at 620 ("Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular

significance."). In sum, the district court did not err by finding that the second prong of the SDP commitment criteria was proved by clear and convincing evidence.

Highly Likely to Engage in Acts of Harmful Sexual Conduct

Cooper argues that "[t]here is insufficient evidence contained in the record to support the [d]istrict [c]ourt's finding that [he] is highly likely to engage in future acts of harmful sexual conduct." When examining whether an offender is highly likely to engage in acts of harmful sexual conduct, the district court considers the same six factors that are used to determine dangerousness under the sexual-psychopathic-personality statute. *Linehan III*, 557 N.W.2d at 189 ("We conclude that the guidelines for dangerousness prediction in [*In re Linehan*, 518 N.W.2d 609 (Minn. 1994) (*Linehan I*)] apply to the SDP Act. . . ."). Those factors are: (a) relevant demographic characteristics; (b) history of violent behavior; (c) base rate statistics for violent behavior among those with the individual's background; (d) sources of stress in the individual's environment; (e) the similarity of the individual's future context to the context in which the individual engaged in harmful sexual conduct in the past; and (f) the individual's record in sex therapy programs. *Linehan I*, 518 N.W.2d at 614. "No single factor is determinative of this complex issue." *In re Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011); *see also Linehan III*, 557 N.W.2d at 189 (stating that statistical evidence of recidivism "is only one of the six factors" and that district courts may consider evidence beyond the *Linehan* factors in addressing the "complex and contested" matter of predicting dangerousness).

The district court thoroughly considered each of the *Linehan* factors. The district court found that Cooper is a 53-year old, lower-functioning man, who has little formal education or training, no significant employment history, and very little, if any, family support. The district court further found that Cooper has a history of domestic violence. As to base-rate statistics, two assessment tools predict that Cooper has a high likelihood of reoffending, two assessment tools predict that Cooper has a moderate to high likelihood of reoffending, and two assessment tools predict that Cooper has a moderate likelihood of reoffending. Thus, the district court found that "base rate statistics for violent behavior and sexual offending recidivism support a determination that [Cooper] is highly likely to engage in acts of harmful sexual conduct."

The district court also found that "[t]he sources of stress in the environment, including cognitive and affective factors which indicate how [Cooper] may be predisposed to cope with stress, and the similarity of the present or future context in which [Cooper] will find himself to those contexts in which he sexually offended supports a determination that he is highly likely to engage in acts of harmful sexual conduct." Lastly, the district court found that Cooper has not successfully completed sex-offender treatment. The record clearly and convincingly supports the district court's findings. In addition, the district court explicitly credited Dr. Reitman's opinion that Cooper is highly likely to engage in future acts of harmful sexual conduct.

Cooper argues that his age is a mitigating factor but acknowledges that he was 45 years old at the time of his last offense, so he states that "[t]his factor does not clearly weigh in favor of either party." Cooper concedes that his history of violent behavior

weighs against him. As to base-rate statistics, Cooper argues that "the record shows that base rate statistics related to [him] weigh to show he is not of a high risk to reoffend sexually based on the scattering of the actuarial scores." In addition, Cooper insists that his close relationship with his mother, his desire to regain contact with members of his family, his intention to move to a halfway house and participate in sex-offender treatment, and his history of sex-offender-treatment participation constitute "mitigating evidence" demonstrating that he is not highly likely to reoffend sexually.

Cooper's arguments regarding the *Linehan* factors are similar to his arguments regarding the first two elements of the SDP commitment criteria: his opinion and testimony about his base-rate statistics, sources of stress, similarity of contexts, and history of sex-offender treatment should be given greater weight than Dr. Reitman's opinion and the facts underlying it. Cooper essentially asks this court to determine the credibility of the witnesses and weigh the evidence. We will not do so. *See Linehan III*, 557 N.W.2d at 189 (stating that appellate courts "will not weigh the evidence" but rather "will determine if the evidence as a whole presents substantial support for the district court's conclusions").

In sum, the district court did not clearly err in finding that Cooper is highly likely to engage in harmful sexual conduct in the future. Moreover, the evidence clearly and convincingly establishes that he meets the criteria for commitment as an SDP.

II.

Cooper contends that the district court erred in concluding that a less-restrictive alternative to commitment to a secure treatment facility is unavailable. Upon a finding

that an individual is an SDP, "the court shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the respondent under commitment, and is consistent with the person's treatment needs and the requirements of public safety." 2013 Minn. Laws ch. 49, § 7, at 214 (to be codified at Minn. Stat. § 253D.07, subd. 3 (Supp. 2013)). "Secure treatment facility means the [MSOP] facility in Moose Lake and any portion of the [MSOP] operated by the [MSOP] at the Minnesota Security Hospital." 2013 Minn. Laws ch 49, § 10, at 226 (to be codified at Minn. Stat. § 253D.02, subd. 10 (Supp. 2013)). The definition of secure treatment facility "does not include services or programs administered by the [MSOP] outside a secure environment." *Id.* This court reviews a district court's determination of the least restrictive alternative under the clearly erroneous standard. *Thulin*, 660 N.W.2d at 144.

In support of his assertion of error on this point, Cooper argues that he will be on intensive supervised release until 2025, he is currently seeking placement at a halfway house, and he will participate in outpatient sex-offender treatment. But Cooper has not identified an outpatient sex-offender-treatment program, halfway house, or other residential facility that is willing to accept him. Moreover, Cooper does not explain how his proposed less-restrictive treatment program is consistent with his treatment needs or with the requirements of public safety. We observe that Cooper has a history of violating probationary and supervised-release conditions by smoking marijuana, contacting victims, engaging in an inappropriate relationship and voyeuristic behavior, failing to

comply with electronic home monitoring, and being terminated from outpatient sex-offender treatment.

"Under the current statute, 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." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (emphasis omitted), *review denied* (Minn. Dec. 19, 2001). Because Cooper is not entitled to placement in a less-restrictive treatment program and he has not demonstrated that such a program is available or appropriate, the district court did not err by committing Cooper to the MSOP.

Affirmed.