

Although Justice Saylor agreed that a juvenile's constitutional due process rights are not equivalent to those of an adult, he argued that the same standards apply equally when the Due Process Clause is concerned, with avoiding factual error as a basis for liberty deprivations. In addition, unlike the situation in *Parham* that related to a psychiatric admission, the drug-dependency assessment specified by Act 53 may be initiated by a one-sentence petition by a parent, followed by a relatively short interview by a non-physician who is not required to conduct a thorough background evaluation based on school and social service records. Justice Saylor cautioned that Act 53 permits such "heavy handed actions" against minors in a "purely civil context," including arrest and shackling by multiple law enforcement agents followed by transport and evaluation at court, such that due process protections were inadequate.

Discussion

In this case, the court addressed the procedural requirements governing the involuntary commitment of a minor to a drug and alcohol treatment program. As the court pointed out, statutes providing for involuntary commitment for substance abuse treatment for minors in several other states offer different protections. For example, in Oklahoma and Indiana, a petition can be filed only when the minor has been evaluated by a medical professional. Unlike Act 53, several other state statutes (e.g., those of Delaware, Michigan, and Wisconsin) grant juveniles the right to an assessment by an independent examiner. Moreover, many states including Florida, Massachusetts, and Utah, require a showing that a youth is a danger to himself or others as a result of drug or alcohol dependence. Finally, many state statutes (e.g., those of Oklahoma, Utah, and Wisconsin) require the determination that inpatient treatment is the least restrictive setting that is consistent with treatment goals.

The court articulates the explicit presumption that parents and guardians (in the absence of abuse or neglect) will act in the best interest of their children and characterizes the parent or guardian's right to determine the child's care and custody as paramount. Nevertheless, Act 53 and similar statutes place the evaluator in the unique position of assessing the appropriateness of the parent or guardian's request. It is, after all, the evaluator who is tasked with assessing whether the juvenile is truly in need of inpatient

commitment. Although this case describes these evaluations as therapeutic rather than punitive, best practices generally involve the review of additional sources of information to ensure that the evaluator's conclusion regarding the juvenile's need for treatment is indeed in his or her best interests and meets the local jurisdictional standard for commitment.

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Treatment Disclosures in Sex Offender Civil Commitment Evaluations

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Statements Made During Treatment-Related Activities May Not Be Privileged for Purposes of Sex Offender Civil Commitment Evaluations

In the case of *In the Interest of Maedche*, 788 N.W.2d 331 (N.D. 2010), the district court involuntarily committed Thomas Maedche as a sexually dangerous individual. On appeal, the North Dakota Supreme Court decided whether North Dakota's sexual offender civil commitment statute should be voided because of vagueness and whether treatment-related disclosures should be precluded from sex offender commitment proceedings on the basis of the self-incrimination and due process protections of the U.S. Constitution.

Facts of the Case

Thomas Maedche pled guilty and was convicted of indecent exposure for exposing himself and masturbating in front of a nine-year-old girl during a sleepover at a hotel. He submitted to a sex offender risk assessment and psychological evaluation as part of the presentence investigation report. The risk assessment, which included administration of the Static-99 and Minnesota Sex Offender Screening Tool, Revised (MnSOST-R), indicated a high risk of reoff-

fense. During the psychological evaluation, He denied being sexually attracted to children or engaging in atypical sexual behavior in adulthood, including exposing himself and masturbating in front of the girl in the hotel room. He reported, in a vague manner, having had an inappropriate sexual incident with young girls when he was 12 years old. Records indicated that he had engaged in at least two separate incidents with young girls during his preteen years. Neither of the two psychologists who evaluated him and reviewed his records recommended that he be assessed for civil commitment. Instead, it was recommended that he participate in outpatient treatment, closely supervised probation, and long-term monitoring or community aftercare and that he undergo a polygraph examination, to clarify his denial of the index offense.

Mr. Maedche reported to his probation officer one day after being released from the detention center. During the meeting, Mr. Maedche admitted to having exposed himself to the girl in the hotel. He also stated he has always been attracted to young girls. As part of his terms of probation, he attended outpatient sex offender therapy and submitted to a prepolygraph interview and examination. During the prepolygraph interview, he disclosed previously unknown sexual contact with minors that occurred when he was an adult. These incidents included indecent exposure, molestation of young children, theft and purchase of girls' and women's underwear for sexual gratification, and Internet searches for non-nude pornography, in which children were in suggestive poses. When asked if he would take sexual advantage of someone in his care or custody if he knew no one would find out, he stated, ". . . [Y]es, I would. I have no doubt in my mind right now that I would. Right now I'm hoping the treatment changes that." The polygraph examination was scored as inconclusive—neither conclusively deceptive nor truthful.

Shortly after the interview and polygraph examination, the district court found probable cause and ordered Mr. Maedche to undergo a sex offender civil commitment evaluation. He was evaluated by two psychologists. Each psychologist completed a report and testified before the district court. The psychologists disagreed about whether he met the statutory definition of a sexually dangerous individual. The evaluator who concluded that he did not meet statutory criteria based her opinion on the belief that he

did not meet the statutory definition of a sexually dangerous individual, that there was no evidence that he had serious difficulty controlling his behavior, and that he was not likely to engage in further acts of sexually predatory conduct. The district court held that he was a sexually dangerous person and civilly committed him.

Mr. Maedche appealed his commitment by arguing that North Dakota's sex offender civil commitment statute, North Dakota Century Code, Chapter 25-03.3 (2001) (hereinafter, § 25-03.3) is unconstitutional, because it is unduly vague and subject to employment in an arbitrary or discriminatory manner, and that self-incrimination and due process guarantees preclude the use of a sex offender's treatment-related disclosures in a civil commitment proceeding.

Ruling and Reasoning

The North Dakota Supreme Court held that § 25-03.3 is not unconstitutionally vague, because it creates minimum guidelines, gives a clear definition of what constitutes a sexually dangerous individual, defines terms used (e.g. sexual act, sexual contact, and sexually predatory contact), and provides a reasonable person with adequate and fair warning of when a civil commitment evaluation may occur. The court agreed with Mr. Maedche's contention that indecent exposure is neither a sexual act nor sexual contact as defined by § 25-03.3. However, it held that the index offense does not have to be the source of the civil commitment petition. He admitted molesting young girls as an adult. Although these incidents were not reported or prosecuted, they constituted sexually predatory conduct that was permissible for the district court to consider for purposes of civil commitment.

Regarding his disclosures during the prepolygraph interview and examination, the court held that admission of these incriminating statements did not violate his due process rights and privilege against self-incrimination. In *Allen v. Illinois*, 478 U.S. 364 (1986), the U.S. Supreme Court held that sex offender civil commitment proceedings were not criminal within the meaning of the Fifth Amendment, and due process does not require the privilege against self-incrimination to apply. In *Interest of M.D.*, 598 N.W.2d 799 (N.D. 1999), the North Dakota Supreme Court held that § 25-03.3 is not criminal, because it focuses on treatment and predicting future

behavior. Mr. Maedche argued that while treatment may be the stated purpose of § 25-03.3, the procedures used and consequences imposed in his case make the statute punitive. In its opinion, the court stated that he did not offer “the clearest proof” that § 25-03.3 is “so punitive,” either in purpose or effect as to negate the state’s intention that the statute is civil as opposed to criminal. The court identified elements of sex offender civil commitment in North Dakota that further indicate that § 25-03.3 is not criminal. For instance, sexually dangerous individuals are committed to the care, custody, and control of the executive director of the North Dakota Department of Human Services. The director then places the committed individual in the least restrictive treatment facility or program available. Each year, the committed individual may request discharge, and the state must show by clear and convincing evidence that the individual remains sexually dangerous.

Dissent

One justice provided a dissenting opinion and argued that Mr. Maedche was committed in violation of his Fifth Amendment right against self-incrimination. The dissent went beyond the civil nature of the statute and focused primarily on the “context” in which he made his incriminating statements. The dissenting justice argued that Mr. Maedche was compelled, as a condition of his probation, which was part of his criminal sentence, to take a prepolygraph interview and examination. The polygraph was not administered by a therapist, but rather by a Bureau of Criminal Investigations (BCI) agent. If Mr. Maedche had failed to respond to the polygraph questions, he would have violated conditions of probation. Such a violation could have led him to lose his liberty for the time to which he could have originally been sentenced. Instead, by complying with the conditions of his probation, he lost his liberty for an indefinite period. In addition, by submitting to the polygraph, he disclosed the only act he engaged in as an adult that qualified as “sexually predatory conduct” for purposes of civil commitment. This act was previously unknown to law enforcement, and the sexual history that was known was insufficient to commit him. Furthermore, he had submitted to the polygraph without the presence of counsel.

Discussion

Each of the court’s main findings surrounding *In the Interest of Maedche* has implications for forensic

practice. The court held that North Dakota’s sex offender civil commitment statute was not unduly vague, in part because it gives a “clear” definition of a sexually dangerous individual and defines the terms used. Section 25-03.3 defines a qualifying diagnosis as “a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct” (*Maedche*, p 335). By classifying this definition as “clear,” without addressing the inherent vagueness of the word “other,” the court did not address the difficulty that forensic evaluators have faced in determining what constitutes a qualifying diagnosis for purposes of sex offender civil commitment (see *Sex Abuse* 19:425–48, 2007).

Regarding treatment-related disclosures, the admissibility of Mr. Maedche’s statements during the prepolygraph interview and polygraph examination turned on the question of whether the statements were made in a civil or criminal context. If statements are made in a civil context, the privilege against self-incrimination does not apply; if statements are made in a criminal context, it does. In its decision, the North Dakota Supreme Court broadly construed what constitutes “treatment” for purposes of sex offender civil commitment. While this ruling applies only in North Dakota, clinicians in other jurisdictions should take note of how such a broad interpretation may affect clients whom they treat, and they should adjust their warnings as to the limits of confidentiality accordingly.

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Limitations on the Use of Evidence From Evaluations of Competence to Stand Trial in the Penalty Phase

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