

had met requirements of standard of care and should prevail in the case.

Discussion

At the time of this commentary, the case was back in the district court. Although the case raises questions of legal strategy, the relevant concern for forensic psychiatrists and psychologists is the court's view of what constitutes mental impairment. Many physical illnesses and severe traumas result in coma and altered consciousness; under those circumstances, a diagnosis of mental disorder is rarely applied. Yet under Nebraska law, the tolling could hold a medical team liable for months and potentially years in cases of prolonged coma or consequences of severe brain damage. The court applied a common sense view that Mr. Maycock was not able to make decisions for himself because of an altered mental state. Notably, however, the facts of the case suggest that, in early interviews with the doctors, he was able to respond to questions. His condition deteriorated over time, but not before doctors determined that he had ingested antifreeze, the poison that resulted in his physical deterioration, coma, and death.

This case has several other interesting dimensions. First, a presumably competent representative was given the tolling right, even though no type of incapacitation prevented him from pursuing the legal claims in a timely manner. Second, the apparently simpler defense based on the formalities of the statute of limitations proved to be far less prudent than the more complex defense invoking affidavits regarding standards of care. Finally, although the Nebraska Court of Appeals determined that Mr. Maycock was "undisputedly . . . suffering from a mental disorder, i.e., incapacitated" (*Maycock*, p 329) on November 22, 2005, when he became comatose, questions of material fact remained as to whether he was incapacitated before November 22. Since the suit was filed on November 22, 2007, this determination is critical to the two-year statute of limitations. For example, Mr. Maycock appeared to be largely unresponsive to efforts at communication on November 18, as described earlier. If he were found to be incapacitated on that date, the two-year statute of limitations would presumably have expired on November 18, 2007. The final determination of these findings is still being litigated at the time of this review.

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Civil Commitment of Native American Sex Offenders: Do States Have Jurisdiction?

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State Interests in Public Safety Weighed Against Federal Law Protecting Tribal Authority

In *In re Civil Commitment of Johnson*, 800 N.W.2d 134 (Minn. 2011), the state of Minnesota sought to commit two Native Americans on the basis of their histories of criminal sexual acts. Both individuals appealed, arguing that the district court had no jurisdiction over them as Native Americans. The Minnesota Supreme Court had to balance state interests against federal laws protecting tribal authority. The court's reasoning gave consideration to the classification of the commitment of sexually dangerous persons as a civil rather than a criminal matter. The court also considered where civil commitment falls on the dividing line between private and civil regulation.

Facts of the Case

Jeremiah Jerome Johnson was an enrolled member of the Bois Forte Band of the Minnesota Chippewa Tribe. In 2003, at age 17, he sexually assaulted a 15-year-old girl. He pleaded guilty to a false imprisonment charge for this offense. Two years later, Mr. Johnson forced another 15-year-old girl to have sexual intercourse, and he pleaded guilty to fourth-degree criminal sexual conduct. Mr. Johnson was successfully committed to the Minnesota Sex Offender Program in 2009, after the district court determined that he satisfied the statutory requirements for commitment as a sexually dangerous person (Minn. Stat. § 253B.02(18c) (2009)) for conduct committed on and off the reservation. The court made Mr. Johnson's commitment indeterminate later that year.

Lloyd Robert Desjarlais was an enrolled member of the Minnesota Chippewa Tribe. In 2002, at the

age of 14, Mr. Desjarlais engaged in both consensual and forced sexual conduct while at a juvenile center satellite home. In 2004, at the age of 16, the district court also found that he violently forced intercourse on a 15-year-old girl on three separate occasions. Finally, in 2007, he was charged with one count of second-degree criminal sexual conduct, but pleaded guilty to a lesser count of felony solicitation of a child to engage in sexual conduct. The sentencing court stayed his sentence. However, Mr. Desjarlais violated the conditions of the court and was consequently sentenced to 20 months in prison (although several of these charges had been stayed or reduced in plea bargaining). In 2008, Cass County sought to commit Mr. Desjarlais as a sexual psychopathic personality and a sexually dangerous person under the Minnesota statute. The district court concluded that Mr. Desjarlais satisfied the requirements for commitment as a sexually dangerous person and committed him to the Minnesota Sex Offender Program for an indeterminate period.

Mr. Johnson and Mr. Desjarlais separately appealed the district court rulings with regard to civil commitment, arguing that the district court lacked jurisdiction over them as enrolled tribal members. The Minnesota Court of Appeals consolidated the cases and denied the motions to dismiss. Mr. Johnson and Mr. Desjarlais appealed to the Minnesota Supreme Court solely on the basis of subject matter jurisdiction.

Ruling and Reasoning

The Minnesota Supreme Court affirmed the lower court's decision, concluding that the civil commitment of the appellants as sexually dangerous persons (for conduct committed on and off the reservation) did not unduly interfere with tribal sovereignty. It also concluded that civil commitment was not otherwise preempted by federal law. The decision was based on the court's conclusion that the state's enforcement of civil commitment law against tribal members was supported by exceptionally strong state interests in protecting public safety and rehabilitating persons with mental illness.

The court first addressed the "question of whether Congress has expressly consented to Minnesota's exercise of jurisdiction" (*Johnson*, p 139). It analyzed two distinct arguments by the county and district courts for state jurisdiction.

First, the county argued (and the district court ruled) that jurisdiction exists under both the criminal and civil grants of jurisdiction. The Minnesota Supreme Court declined to classify civil commitment as a criminal statute, noting that it had previously held that "commitment of sexually dangerous persons and sexual psychopathic personalities is a civil not a criminal matter" (*Johnson*, p 139, citing *In re Linehan*, 594 N.W.2d 867 (Minn. 1999)). It then examined whether the commitments were "civil courses of action" over which Minnesota would have jurisdiction based on Public Law 280, a federal law passed in 1953, establishing the jurisdiction of six states (including Minnesota) over certain civil matters involving Native Americans on reservations. The law specifies that state civil laws relevant to private persons or property can be enforced within Native American tribal lands as they are elsewhere within the state. The court first cited two cases where the law was found not to apply. In both cases, the court found that Public Law 280 did not grant states general civil regulatory authority over tribal Native Americans, but applied only to private civil litigation. Hence, the court noted that its job in this case was to assess whether the commitment statute was civil law applicable to private litigation in state court or general state civil regulatory control over Native American reservations. It acknowledged the fine line between private civil litigation and state regulation, noting that adjudication of civil controversies usually requires the application of rules that regulate private conduct. However, it concluded that because the state was seeking to "adjudicate the status or condition of private individuals . . . it is more akin to the laws of contract, tort, marriage, divorce, insanity, or descent, than to an assertion of sovereignty like the power to tax or grant franchises" (*Johnson*, p 142). Therefore, the court concluded that Minnesota has jurisdiction over civil commitment under Public Law 280.

Second, the county made an alternative argument for state jurisdiction, contending that the commitments were within the state's jurisdiction because the state's exceptional interests justified the exercise of jurisdiction over the appellants. The court noted that, on the basis of the Indian Healthcare Improvement Act of 1976, applying the procedures of an involuntary commitment to a Native American person on tribal grounds would intrude on tribal sovereignty. However, it also noted, "The Indian Health

Care Improvement Act contains no express statement of intent to preclude state jurisdiction over the civil commitment of sexually dangerous tribal members. Nor does the Act provide for the commitment of Indians as sexually dangerous persons” (*Johnson*, p 145). It then concluded that “Congress has more directly expressed its intent for *states* to have primary responsibility for civil commitments of sexually dangerous persons” (*Johnson*, p 145, emphasis in original). The court also noted that the state has compelling interests to protect the citizens of Minnesota from those who pose a severe threat to their health and safety and to protect the public from violent sexual assaults and that “the strength of the State’s interests in protecting the public cannot be disputed” (*Johnson*, p 147). It opined that the civil commitment statute directly serves these interests, because classifying someone as a sexually dangerous person “specifically requires findings that the person is likely to reoffend and harm the public” (*Johnson*, p 147).

In concurrence, Justice Meyer noted that he disagreed with the court’s finding regarding civil commitment as a “private cause of action” stating:

It is hard to imagine this case as a private civil cause of action involving Indians. Similarly, it is difficult to characterize these state initiated actions, which are intended to benefit the public at large and not a private individual and which are conducted pursuant to Minnesota’s sovereign police powers, as private causes of action to which Indians are parties [*Johnson*, p 150].

Discussion

Civil commitment of sexually dangerous persons is a challenging area of the law that is based on the

need to balance the civil liberties of an individual (who for all intents and purposes may be held indefinitely) against the safety of the public. The complexity is compounded when considering state jurisdiction over individuals versus tribal sovereignty. It is noteworthy that there was no attempt by either defendant’s tribal council to weigh in on whether it wanted jurisdiction. They may have hesitated in part because the tribal court/council was relatively new and may not yet have had the capacity to address this type of subject material.

Twenty states have enacted legislation providing for the civil commitment of sexually dangerous persons. In 2006, the Adam Walsh Child Protection and Safety Act authorized a federal government civil commitment program for federal sex offenders. The criteria for these commitments usually include a mental abnormality or personality disorder that predisposes for future acts of sexual violence. Potential benefits include public safety and opportunities to receive treatment to reduce recidivism. Criticisms of the use of civil commitment legislation include the use of criteria defined by legislative bodies instead of by mental health communities, the ongoing need for evaluation of evidence-based treatments for sexually dangerous persons, and the diversion of resources away from those with severe, persistent, and debilitating mental illness. In this case, as often occurs, the court seems to have placed public safety concerns above all these other considerations.

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