

ORIGINAL

20080037

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

APR 14 2008

In the Matter of E.W.F.)
State of North Dakota,)
Petitioner-Appellee,)
vs.)
E.W.F.,)
Respondent-Appellant.)

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20080037

APPELLANT'S BRIEF

APPEAL FROM THE JANUARY 15, 2008 ORDER DENYING
PETITION FOR DISCHARGE
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE STEVEN E. McCULLOUGH PRESIDING

ATTORNEY FOR APPELLANT

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NORTH DAKOTA CENTURY CODE

§ 25-03.3-01 1,5

§ 25-03.3-13 6

§ 25-03.3-18 2,5-6

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the State proved by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct, where the State did not offer into evidence Dr. Sullivan's written evaluation, but instead relied solely on Dr. Sullivan's conclusory statements?
- II. Whether Respondent's substantive due process rights have been violated because his commitment proceeding is a mechanism for retribution and circumvents the criminal justice system where he was originally committed due to a pedophile's evaluation, the state hospital has a zero percent treatment rate, he has been at the state hospital for nine years, and where Dr. Sullivan opined it would be futile for him to petition for discharge next year?

STATEMENT OF THE CASE

Respondent-Appellant E.W.F. appeals the January 15, 2008 Order Denying Petition for Discharge. Respondent seeks reversal on the grounds that the State did not prove by clear and convincing evidence that he was likely to engage in further acts of sexually predatory conduct and that his substantive due process rights were violated.

On September 1, 1998, pursuant to N.D.C.C. § 25-03.3-01,

E.W.F. was committed to the care, custody, and control of the executive director of the Department of Human Services.¹ For the next eight years, E.W.F. waived his right to a discharge hearing.

Pursuant to N.D.C.C. § 25-03.3-18, on September 20, 2007, E.W.F. filed a request for a discharge hearing. (A-2)² Thereafter, E.W.F. was court appointed counsel. On September 28, 2007, Dr. Sullivan's SDI Annual Re-evaluation was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 15) Pursuant to the October 25, 2007 Order For Appointment of Expert, Dr. James H. Gilbertson was appointed to perform an examination of E.W.F. and be his expert witness for the trial. (Order For Appointment of Expert, docket sheet No. 20)

On January 3, 2008, a trial on the petition was heard before the Honorable Steven E. McCullough. The State offered the testimony of Dr. Lynne Sullivan, but did not offer into evidence Dr. Sullivan's SDI Annual Re-evaluation. E.W.F. chose not to call Dr. Gilbertson to testify. Instead, E.W.F. testified.

On January 15, 2008, the Order Denying Petition for Discharge was filed. Judge McCullough found that E.W.F. "continues to be a sexually dangerous individual and his PETITION FOR DISCHARGE is **DENIED.**" (A-7)

Thereafter, on February 6, 2008, Respondent filed his

¹ There has been a clerical error because the Order is not listed on the docket sheet.

² Appendix

Notice of Appeal, appealing the Order Denying Petition for Discharge. (A-8)

STATEMENT OF THE FACTS

The essential facts are not in dispute. In 1994, Respondent E.W.F. was convicted of gross sexual imposition. He served approximately 4.5 years in the state penitentiary. (T 43)³ Subsequently, based on the evaluation of two state hospital doctors, on September 1, 1998, Respondent was committed as a sexually dangerous individual under Chapter 25-03.3 of the North Dakota Century Code. Dr. Joseph Belanger, one of the doctors who evaluated E.W.F., resigned from the State Hospital because "he admitted that he was looking at pedophilic type of pictures on the Internet." (T-37)

At trial, Dr. Lynne Sullivan testified that since 1998 approximately 60 individuals have been adjudicated as sexually dangerous individuals under Chapter 25-03.3 of the North Dakota Century Code and have been admitted to the North Dakota State Hospital. Dr. Sullivan admits that after ten years, none of the sexually dangerous individual patients have been successfully treated and released from the state hospital. (T 30,38) Dr. Sullivan testified that currently only one patient out of sixty is at the level five treatment stage. (T 31) During cross-examination, Dr. Sullivan testified that even if E.W.F. successfully modified his

3 Trial Transcript

behavior and accomplished everything the state hospital requested of him during the next year, Dr. Sullivan opined that E.W.F. could still not be discharged from the state hospital. (T 39-40)

Dr. Sullivan testified that E.W.F. has not committed a sex offense during the last nine years. (T 32) Dr. Sullivan opined that E.W.F. "has a sexual disorder called paraphelia not otherwise specified." (T 28). Dr. Sullivan further opined that E.W.F. was likely to engage in further acts of sexually predatory conduct. (T 26-27)

E.W.F. testified that if he was released from the state hospital, he would not reoffend because he has changed significantly since 1998. (T 44,48) E.W.F. was remorseful for his behavior: "I believe nobody should be put through a molestation or a rape." (T 46) E.W.F. also testified that he did not complete treatment due to the three changes in the program since 1998. (T 48)

ARGUMENT

- I. The State did not prove by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct where the State did not offer into evidence Dr. Sullivan's written evaluation, but instead relied solely on Dr. Sullivan's conclusory statements.

The standard of review for a commitment of a sexually dangerous individual is a modified clearly erroneous standard. The commitment order will be affirmed unless the district court had an erroneous interpretation of the law "or we are firmly convinced the order is not supported by clear and convincing evidence." Matter of Hehn, 2008 ND 36, ¶ 17.

Under N.D.C.C. § 25-03.3-18(4), "the burden of proof is on the state to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual." Under N.D.C.C. § 25-03.3-01(8), the State must prove by clear and convincing evidence that the person has:

"engaged in sexually predatory conduct and who has 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 which constitute a danger to the physical or mental health or safety of others."

"The term 'likely to engage in further acts of sexually predatory conduct' means the individual's propensity towards sexual violence is of such a degree as to pose a threat to

others." Id. ¶ 19. In addition, in order to satisfy substantive due process of law requirements in Kansas v. Crane, 534 U.S. 407, 413 (2002), "the individual must be shown to have serious difficulty controlling his behavior." Id. at ¶ 19. This additional requirement is necessary to distinguish a sexually dangerous individual from the "dangerous but typical recidivist convicted in an ordinary criminal case." Crane at 413.

At an original commitment proceeding, under N.D.C.C. § 25-03.3-13, reports and evaluations of experts are automatically admissible at trial: "any testimony and reports of an expert who conducted an examination are admissible, including risk assessment evaluations." However, at a discharge hearing, under N.D.C.C. § 25-03.3-18, it does not state that reports and evaluations are automatically admissible at the hearing.

At the trial, the State chose not to offer Dr. Sullivan's SDI Re-evaluation. Nor did the court consider it in its Order Denying Petition for Discharge. (A-3)

Here, the State did not prove by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct. At the trial, the only evidence that the State presented to satisfy the third prong of the statute was during the following colloquy:

"Q. Let me move onto the next one. The third prong, likelihood to engage in future acts of sexually

predatory conduct. Have you an opinion on that subject?

A. Yes, I do. I believe by virtue of his stalking behaviors, his paraphelia not otherwise specified, and likely the presence of pedophilia, although that isn't as clearly established over this past time frame, but as I stated, I can't see how it would have just disappeared. But nevertheless, definitely the paraphelia not otherwise specified stalking behavior is sexually dangerous type behavior and makes him likely to engage in that sort of behavior in the future given that he's continuing to engage in it over this past year.

The other thing that I would point out is that his personality disorder affects the sexually deviant behaviors and arousal and his ability to modulate that sort of behavior. So you know, he's got some antisocial traits and some narcissistic traits which indicate that he tends to think that he is above the rules. The rules don't apply to him. That he is more special or unique than other people. Things like that. And therefore, --an the antisocial part of it means that he can engage in offending behaviors with little or no regard for other people's rights or wishes or concerns about them. So all of that combined with the sexual disorder makes him likely to engage." [Trial Transcript pp. 26-27]

At no time did Dr. Sullivan opine that her opinion was made

with a reasonable degree of scientific certainty.

Moreover, on cross-examination, Dr. Sullivan conceded that statistically most sex offenses occur when the offender is between the ages of 18 and 30. (T 36). Dr. Sullivan admitted that a sexual offender can "age out" of offending. (T 34-36) However, despite the fact that E.W.F. is now 34 years old, on cross examination, Dr. Sullivan admitted that she did not recalculate the Minnesota Sex Offenders Screening Tool, the Static 99, or the Rapid Risk Assessment Sexual Offense for the discharge hearing. (T 32-34,41)

On cross examination, Dr. Sullivan admitted that a sexual offender is more likely to commit a sexual offense than someone in the general population. (T 32) However, she never distinguished how E.W.F. is different from the "average sexual offender" or different from the typical, dangerous criminal. She refused to give a probability that E.W.F. was likely to commit another sexual offense. (T 32-33) Moreover, under Crane there was no evidence presented that E.W.F. has serious difficulty controlling his behavior.

In sum, Dr. Sullivan's conclusory statements that E.W.F. is likely to engage in future acts of sexually predatory conduct falls short of the clear and convincing evidence standard. Moreover, her opinion is not grounded on scientific evidence or data, but is merely her conjecture. In fact, it is contrary to the scientific evidence because

E.W.F. is 34 years old and now statically less likely to
commit a sex offense.

II. Respondent's substantive due process rights have been violated because his commitment proceeding is a mechanism for retribution and circumvents the criminal justice system where he was originally committed due to a pedophile's evaluation, the state hospital has a zero percent treatment rate, he has been at the state hospital for nine years, and where Dr. Sullivan opined it would be futile for him to petition for discharge next year.

In the Interest of M.D., 1999 ND 160, ¶ 31, 598 N.W.2d 799, this Court held that N.D.C.C. Chapter 25-03.3 does not violate a committed individual's Sixth Amendment double jeopardy rights. The respondent did not allege substantive due process violations. Nor did he attack how the proceedings are actually implemented, practiced, and applied to him.

In Kansas v. Crane, 534 U.S. 407, 413 (2002), the United States Supreme Court held that in order for a civil commitment to comport to substantive due process of law, there must be a finding of "serious difficulty in controlling behavior." In order to be constitutional, the State must prove that the sexually dangerous individual is different from the "average" sex offender or "average" criminal.

The Crane court stated:

"the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal

case." Id. at 413.

The Crane court relied on Kansas v. Hendricks, 521 U.S. 346, 360 (1997) and noted that civil commitment proceedings cannot be a "mechanism for retribution or general deterrence."

Civil commitment proceedings cannot circumvent the criminal justice system. Crane at 412. Moreover, in order to comport to due process of law, the period of commitment must be for a definite period of time or for only a "potentially indefinite" period of time. Hendricks at 363-364.

Here, as applied to E.W.F., the civil commitment proceeding clearly violates his Fifth Amendment substantive due process rights because it is a mechanism for retribution and in practice it circumvents the criminal justice system. This is because the original commitment proceeding was poisoned by the evaluation of a pedophile and because E.W.F.'s commitment is for an indefinite period of time.

Originally, when E.W.F. was committed, Chapter 25-03.3 required the evaluation and testimony of two experts before a sexually dangerous individual could be committed. Nine years later, it comes to light that Dr. Belanger is a pedophile. (T 37) This revelation casts great doubt on Dr. Belanger's credibility and objectivity. More importantly, the State would not have met their burden if the court had disregarded Belanger's evaluation because they would not have satisfied the requirement of two experts.

Contrary to the respondent in Hendricks, in practice,

E.W.F.'s stay at the hospital is for indefinite period of time--it is not for a "potentially" indefinite period of time. This is illustrated by three important facts which under the totality of the circumstances prove that the commitment proceedings violate E.W.F.'s substantive due process rights.

First, E.W.F. has been at the state hospital for over nine years. On the underlying sexual predatory conduct offense, he served only 4.5 years in prison. This tends to show that his stay is punitive in nature.

Second, in ten years, the state hospital has a 0% success rate in treating sexually dangerous individuals! Approximately 60 sexually dangerous individuals have been admitted in the last 10 years. And no one has been released. Moreover, only one patient is currently at a level five stage.

Third, Dr. Sullivan opined that it would be futile for Respondent to request a discharge hearing next year. Dr. Sullivan indicated that even if E.W.F. did everything "perfect" and did everything requested of him, he could not successfully complete treatment within one year. (T 39) What is even more troubling is that Dr. Sullivan did not know what E.W.F.'s treatment goals (Master Treatment Plan) were or even if he had a treatment plan! (T 31)

The fact that E.W.F. does not have a Master Treatment Plan and that no sexually dangerous individuals have been

released, illustrates that the State is not interested in treating E.W.F. or rehabilitated him, but that the state hospital is merely a retribution center--i.e., a prison disguised as a hospital. Furthermore, E.W.F. testified that the state hospital has had three major revisions in their program in the last nine years. The State did not rebut this evidence or challenge it. It is not possible to complete a treatment program when the state hospital continuously changes it.

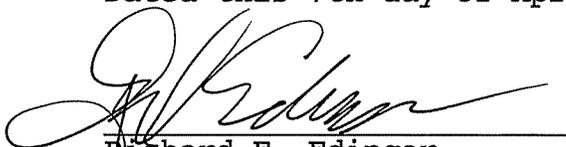
Dr. Sullivan and the state hospital have already usurped Respondent's right for a discharge hearing next year. The legislature specifically gave individuals the right to petition for an annual discharge hearing. However, the right is meaningless when, as here, Dr. Sullivan has opined that such right is futile despite whatever progress E.W.F. makes.

The fact of the matter is that no sexually dangerous individuals, including E.W.F., are ever going to be released from the state hospital, regardless of what progress the patient makes. The state hospital doctors are never going to recommend that a sexually dangerous individual be released. At some point, this Court will have to address the **reality** of the situation--that the state hospital is a retribution center for sexually dangerous individuals, not a treatment center.

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the January 15, 2008 Order Denying Petition for Discharge and discharge him from the care, custody, and control of the executive director of the Department of Human Services forthwith.

Dated this 7th day of April, 2008.



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