

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In the Matter of R.A.S.)	
)	
Cass County State's Attorney,)	
)	
Petitioner-Appellee,)	
)	
vs.)	SUPREME COURT NO. 20090001
)	
R.A.S.,)	
)	
Respondent-Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM THE DECEMBER 2, 2008 ORDER DENYING DISCHARGE
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE STEVEN E. McCULLOUGH PRESIDING

ATTORNEY FOR APPELLANT

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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, when Dr. Gilbertson opined that Respondent was not likely to engage in further acts of sexually predatory conduct?

- II. Whether the district court's order is supported by clear and convincing evidence that Respondent has serious difficulty controlling his behavior?

STATEMENT OF THE CASE

Respondent-Appellant R.A.S. appeals the December 2, 2008 Opinion and 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 he has serious difficulty controlling his behavior.

On August 19, 2004, pursuant to N.D.C.C. § 25-03.3-01, R.A.S. was committed to the care, custody, and control of the executive director of the Department of Human Services. (Order For Commitment, docket sheet No. 41)

Pursuant to N.D.C.C. § 25-03.3-18, on October 18, 2007, R.A.S. filed a request for a discharge hearing. (A-4)¹ On the same day, Dr. Lynne Sullivan's SDI Annual Re-evaluation

¹ Appendix

was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 66) Thereafter, R.A.S. was court appointed counsel and Dr. James H. Gilbertson was appointed to perform an examination of R.A.S. and be his expert witness. (Order Appointing Attorney, docket sheet No. 68; Order For Appointment of Expert, docket sheet No. 80)

On January 14, 2008, a trial on the petition was heard before the Honorable Steven E. McCullough. Dr. Sullivan testified on behalf of the State. Dr. Gilbertson testified on behalf of Respondent.

On January 15, 2008, the Order Denying Discharge was filed. (Findings of Fact, Conclusions of Law and Order Denying Discharge, docket sheet No. 93) On February 12, 2008, Respondent filed a Notice of Appeal, appealing the Order Denying Discharge. (Notice of Appeal, docket sheet No. 100)

In the Matter of R.A.S., 2008 ND 185, 756 N.W.2d 771, the North Dakota Supreme Court reversed and remanded. The North Dakota Supreme Court held that the district court failed to comply with N.D.R.Civ.P. 52(a) and its findings were inadequate to permit appellate review. Id. at ¶ 9.

On December 2, 2008, the Opinion and Order Denying Petition for Discharge was filed. Judge McCullough made specific findings and found that "by clear and convincing evidence that [R.A.S.] continues to be a sexually dangerous individual and his PETITION FOR DISCHARGE is **DENIED.**" (A-12)

On December 30, 2008, Respondent file his Notice of Appeal, appealing the Opinion and Order Denying Petition for Discharge. (A-13)

STATEMENT OF THE FACTS

The essential facts are in dispute. Based on the evaluation of two state hospital doctors, on August 19, 2004, Respondent was committed as a sexually dangerous individual under Chapter 25-03.3 of the North Dakota Century Code. (Findings of Fact, Conclusions of Law & Order for Commitment, docket No. 41) Dr. Joseph Belanger, one of the two state doctors who evaluated R.A.S., resigned from the State Hospital because he confessed to looking at child pornography on the internet. (Petitioner's Exhibit #5, docket No. 89)

While evaluating his sexually dangerous individual patients, Belanger admitted that he suffered "melancholic depressions and anxiety attacks." (Petitioner's Exhibit #6, docket No. 90) He conceded that he should not have done sexually dangerous individual evaluations due to his "own sexual issue" and because of being abused as a child. Id. Belanger also admitted that he was so depressed while evaluating the sexually dangerous individuals that he was suicidal and drank alcohol every night to fall asleep. To cope with his "issues," Belanger turned to child "pornography and masturbation as an outlet." Id.

At trial, Dr. James Gilbertson, opined that "when Dr.

Belanger evaluated [R.A.S.] he was an impaired psychologist, an impaired professional and presumptively we believe an impaired psychologist has lost objectivity." (T 105)² Dr. Gilbertson further testified that he believed Belanger projected his own sexual deviant issues onto R.A.S. when he evaluated him. Hence, Belanger's evaluation of R.A.S. is not objective, nor scientifically accurate. (T 105-106).

On the other hand, the State's expert witness, Dr. Lynne Sullivan testified it was impossible for Belanger's sexual deviant behavior and multiple issues to have caused him to erroneously evaluate R.A.S. Dr. Sullivan denied that it is possible for Belanger to have projected his own sexual issues onto R.A.S. (T 62) Moreover, Dr. Sullivan also vehemently denied that being a pedophile could have effected Belanger's objectivity. (T 60-65)

At trial, the State relied on Dr. Sullivan's testimony, her SDI Annual Re-evaluation, and her SDI Re-evaluation Addendum. (State's Exhibit #2, docket No. 86; State's Exhibit #3, docket No. 87) Whereas, Respondent relied primarily on Dr. Gilbertson's testimony and his evaluation. (Petitioner's Exhibit #8, docket No. 92)

Dr. Sullivan opined that R.A.S. was likely to engage in further acts of sexually predatory conduct and needed to remain in the custody of the director of the Department of Human Services. (T 46, State's Exhibit #2, docket No. 86) Dr. Sullivan agreed with Dr. Etherington's and Dr. Belanger's

² Trial Transcript

original diagnosis. She opined that R.A.S. continues to have the diagnosis of at least paraphilia not otherwise specified with exhibitionistic and nonconsenting features. She further opined that R.A.S. continues to suffer from antisocial personality disorder and that he has an elevated risk for sexually violent offenses. (T 27-29, State's Exhibit #2, docket No. 86) Dr. Sullivan further testified that R.A.S. suffers from sadistic factors. (T 39-41,50)

On the other hand, Dr. Gilbertson opined that R.A.S. was not likely to engage in further acts of sexually predatory conduct. (T 107,114; Petitioner's Exhibit #8, docket No. 92, pp. 26-29) In fact, Dr. Gilbertson opined that R.A.S. should not have been initially committed. (T 113-114) This was based on the fact that the initial risk assessment instruments were miscalculated. (T 92-100, Petitioner's Exhibit #8, docket No. 92, pp. 10-26) Dr. Gilbertson opined that R.A.S. was not sadistic, but instead was your typical "mean and nasty" criminal. (T 90-92, Petitioner's Exhibit #8, docket No. 92, pp. 8-10)

At trial, Dr. Sullivan further 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. (T 67) Dr. Sullivan admitted that after ten years, none of the sexually dangerous individual patients have been successfully treated and

released from the state hospital. Dr. Sullivan testified that currently only one patient out of sixty is at the level five treatment stage. (T 68)

Dr. Sullivan testified that based on what state's attorneys and Dr. Etherington have told her, North Dakota is the easiest state in the country to commit a sexually dangerous individual. North Dakota has the lowest standard to commit an individual. (T 21,52-53)

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, when Dr. Gilbertson opined that Respondent was not likely to engage in further acts of sexually predatory conduct.

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, 745 N.W.2d 631.

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.

Here, the State did not prove by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct where Dr. Gilbertson opined that R.A.S. is not likely to engage in sexually predatory conduct. Clear and convincing evidence is a high standard of proof. Essentially, it is Dr. Sullivan's testimony versus Dr. Gilbertson's testimony.

Dr. Gilbertson's credentials are very impressive and cannot be attacked or challenged. Moreover, he is a neutral, objective psychologist. Moreover, he adheres to the scientific evidence in the scientific community. He has forty years experience in the field of clinical psychology and has been a civil commitment examiner in Anoka County, Minnesota for the last 31 years. He is currently rostered with the Minnesota Attorney General's Office as having specialized expertise in the assessment of sexual predators. Currently, Dr. Gilbertson is one of only nine

doctors recognized in Minnesota as having expertise in the field. In 1994, he was appointed by Governor Arnie Carlson to help draft Minnesota's sexual predator statute. (T 71-78, Petitioner's Exhibit #7, docket No. 91)

On the other hand, Dr. Sullivan is biased and her opinions are subjective. She is exclusively a State witness. (T 8) At trial, Dr. Sullivan's bias is illustrated on two different grounds.

First, her defense of Belanger. Even without Dr. Gilbertson's professional opinion that Belanger was an impaired evaluator, common sense would indicate that there would exist at least the possibility that Belanger's objectivity could be questioned. Moreover, Belanger even admitted that he was not objective and should not have conducted sexually dangerous individual evaluations. (Petitioner's Exhibit # 6, docket No. 90) Dr. Sullivan's hardline stance on Belanger is a clear indication of her bias. She has a clear motive to defend Belanger--to protect the state hospital from civil lawsuits and civil liability.

Second, Dr. Sullivan blatantly ignores principles in the general scientific community. The scientific studies and journals indicate that a sexual offender ages out of reoffending. Once an sexual offender reached the age of 40, there is a 12% decrease in sexual offense recidivism. (Petitioner's Exhibit # 8, docket No. 92, p. 28.)

Here, according to the scientific evidence, because

R.A.S. is now 41 years old, he has a significant decline in his sexual offense recidivism. (T 13) However, Dr. Sullivan attempts to minimize this. And in fact, claims that she is unaware of any scientific studies which support this theory. (T 12-13,47)

Dr. Sullivan's failure to adhere to general principles in the scientific community is also evident in her scoring of the Static-99. Sullivan readily admitted that she uses the original 1999 scoring rules, instead of the more modern 2003 scoring rules. (T 24). However, Dr. Sullivan admitted that the 2003 scoring rules are "much more detailed and may provide additional direction as to whether certain events that occurred within institutional placements should be counted against the person." (T 24) Dr. Sullivan conceded she had no idea what R.A.S.'s score would be under the 2003 Static-99 rules. (T 24,52) Moreover, Dr. Sullivan is not familiar with whether the scientific community uses the 2003 Static-99 scoring. (T 51-52)

In sum, the State did not prove by clear and convincing evidence that R.A.S. is likely to engage in further acts of sexually predatory conduct. This Court cannot be convinced the order is supported by clear and convincing evidence where Dr. Gilbertson opined that R.A.S. is not likely to engage in further acts of sexually predatory conduct. And where the State's only witness is clearly biased.

II. The district court's order is not supported by clear and convincing evidence that Respondent has serious difficulty controlling his behavior.

In order to satisfy substantive due process of law requirements in Kansas v. Crane, 534 U.S. 407, 413 (2002), this Court created an additional element to the three statutory elements contained in N.D.C.C. § 25-03.3-18(4). The state must prove that the individual has serious difficulty in controlling his behavior. Matter of Hehn, 2008 ND 36, ¶ 19, 745 N.W.2d 631.

R.A.S. has been at the state hospital for four years. However, there was no evidence that he has committed an act of sexually predatory conduct, as defined by N.D.C.C. § 25-03.3-01(9), at the state hospital. Presumably, a sexually dangerous individual patient has ample opportunity at the state hospital to engage in sexually predatory conduct. See Matter of M.D., 2008 ND 208, ¶ 11, 757 N.W.2d 559, respondent had "18-month-long sexual relationship" at state hospital. However, despite ample opportunity, R.A.S. has not engaged in any sexually predatory conduct in his four year involuntary confinement. Obviously, this is the best evidence of his ability to control his sexually predatory conduct behavior.

Despite the fact that R.A.S. has not engaged in sexually predatory conduct at the North Dakota State Hospital, Judge McCullough found that R.A.S. would have serious difficulty controlling his behavior. Judge McCullough primarily relied

on the facts that R.A.S. had committed several acts of indecent exposure and had engaged in "many violent instances." (A-10 to A-11)

Judge McCullough's findings were clearly erroneous and violated Kansas v. Crane because they did not distinguish R.A.S. from the "dangerous but typical recidivist convicted in an ordinary criminal case." Arguably, the evidence showed that R.A.S. might have difficulty being law abiding upon his release. However, the State did not prove by clear and convincing evidence that R.A.S. would have difficulty controlling his sexually predatory conduct behavior.

Here, the evidence, at trial, was that the indecent exposure incidents were not sexually predatory conduct, nor indicative of R.A.S. inclination to commit another sexual predatory act or his ability to control his behavior. R.A.S has never committed an act of indecent exposure in the community! (T 49) Instead, all the indecent exposure incidents occurred while he has been incarcerated.

Dr. Gilbertson opined:

"There does not appear to be a history of indecent exposure within the community. This form of sexual acting out may be specifically tied to his institutional living status and, I presume, a way to express his anger and frustration. Nonetheless, the non-contact aspect of his exhibitionism or indecent exposure, in my opinion, would not reach

the harmfulness threshold anticipated in North Dakota statute that would support a finding of a Sexually Dangerous Individual." Petitioner's Exhibit #8, docket No. 92, pp. 28-29)

Dr. Sullivan reluctantly agreed with Dr. Gilbertson that "it's possible" that R.A.S. is just acting out at authority when he commits indecent exposure offenses while he is incarcerated. (T 66)

The fact that R.A.S. has a propensity towards violence might indicate that he is likely to commit a crime similar to the "dangerous but typical recidivist convicted in an ordinary criminal case." However, it does not mean that he has difficulty controlling his behavior regarding sexually predatory conduct.

The State did not prove by clear and convincing evidence that R.A.S. has difficulty controlling his sexually predatory conduct behavior. The evidence presented was pure speculation and conjecture.

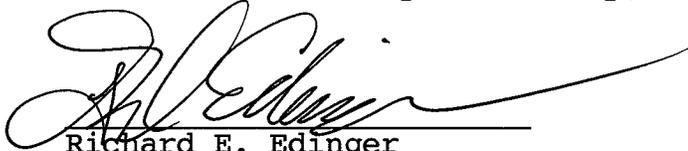
The fact of the matter is that in four years at the state hospital, R.A.S. did not engage in a sexual act as defined in N.D.C.C. § 25-03.3-01(6). In four years at the state hospital, R.A.S. did not engage in sexual contact as defined in N.D.C.C. § 25-03.3-01(7). In four years at the state hospital, R.A.S. did not engage in sexually predatory conduct as defined in N.D.C.C. § 25-03.3-01(9). If R.A.S. had serious difficulty in controlling his behavior wouldn't

he have engaged in sexually predatory conduct or sexual acts at the state hospital like the respondent did in Matter of M.D.?

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the December 2, 2008 Opinion and 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 29th day of January, 2009.

A handwritten signature in black ink, appearing to read 'R. Edinger', is written over a horizontal line. The signature is fluid and cursive, extending to the right beyond the end of the line.

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