

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

COPY

In the Matter of E.W.F.)
Cass County State's Attorney,)
Petitioner-Appellee,)
vs.) SUPREME COURT NO. 20090082
E.W.F.,)
Respondent-Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE FEBRUARY 4, 2009 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
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STATEMENT OF THE ISSUE PRESENTED

I. Whether Respondent's commitment proceeding is a mechanism for retribution and circumvents the criminal justice system because the state hospital treatment program is a sham where Respondent has been unsuccessfully treated for over ten years and where Respondent currently receives only five hours of treatment per week?

STATEMENT OF THE CASE

Respondent-Appellant E.W.F. appeals the February 4, 2009 Order Denying Petition for Discharge. Respondent seeks reversal on the grounds 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.

In 2007, E.W.F. filed a request for a discharge hearing. The district court denied the petition and this Court affirmed. See Matter of E.W.F., 2008 ND 130, 751 N.W.2d 686.

On November 14, 2008, E.W.F. filed a request for a

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

discharge hearing. (A-3)² Thereafter, E.W.F. was court appointed counsel. On December 17, 2008, Dr. Robert Lisota's SDI Annual Re-evaluation was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 52) Pursuant to the January 9, 2009 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. 56)

On January 28, 2009, a trial on the petition was heard before the Honorable Steven E. McCullough. The State offered the testimony of Dr. Robert Lisota. E.W.F. chose not to call Dr. Gilbertson. Instead, E.W.F. testified.

On February 4, 2009, the Opinion and 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-8)

Thereafter, on March 4, 2009, Respondent filed his Notice of Appeal, appealing the Opinion and Order Denying Petition for Discharge. (A-9)

STATEMENT OF THE FACTS

The essential facts are not in dispute and are similar to the facts in Matter of E.W.F., 2008 ND 130, 751 N.W.2d 686. Based on reviewing less than one half of E.W.F.'s entire file, Dr. Robert Lisota completed an evaluation on

² Appendix

E.W.F. and testified at trial. (T 25)³

Dr. Lisota opined that E.W.F. has a sexual disorder. He is diagnosed with "pedophilia [sic] exclusive type, attracted to females, paraphilia NOS nonconsent, fetishism, depressive disorder NOS, personality disorder NOS with antisocial narcissistic and histrionic features and borderline intellectual functioning." (T 16). Dr. Lisota further opined that E.W.F. was likely to engage in further acts of sexually predatory conduct. (T 26-27) Dr. Lisota also opined that E.W.F. has serious difficulty controlling his behavior. (T 24)

Dr. Lisota testified that E.W.F. currently receives five hours of treatment a week at the state hospital. E.W.F. does not receive any treatment on the weekends. In fact, the state hospital does not offer treatment or classes on the weekends. (T 26) E.W.F. corroborated Dr. Lisota's testimony. (T 41)

Dr. Lisota testified that E.W.F. has extreme anger management issues. (T 17-18) However, Dr. Lisota does not know if the state hospital offers anger management classes. (T 27) E.W.F. testified that the state hospital does not offer anger management classes. (T 41)

Dr. Lisota testified that E.W.F. does not receive any individualized treatment for his own individual needs. (T 33) E.W.F. is not receiving any individualized treatment to help with his antisocial behavior. (T 32). Moreover, currently,

E.W.F. cannot receive treatment for chemical dependency issues. (T 34)

ARGUMENT

I. Respondent's commitment proceeding is a mechanism for retribution and circumvents the criminal justice system because the state hospital treatment program is a sham where Respondent has been unsuccessfully treated for ten years and where Respondent currently receives only five hours of treatment a week.

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.

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 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 E.W.F.'s commitment is for an indefinite period of time.

In Matter of E.W.F., 2008 ND 130, 751 N.W.2d 686, 751 N.W.2d 686, this Court held that bare assertions that E.W.F.

is at the state hospital for an indefinite period of time is not sufficient to prove a substantive due process of law violation. Instead, there has to be sufficient and concrete facts to support the due process allegations. Id. at ¶ 21. Respondent respectfully believes that he has specific and concrete facts.

Here, contrary to the respondent in Hendricks, 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 ten years. The state hospital treatment program has failed to treat E.W.F. for the last ten years.

Second, as Dr. Lisota testified, E.W.F. only receives five hours of treatment a week! 97% of the time, E.W.F. is not receiving any treatment to treat his sexual disorders.
(T 31)

Third, E.W.F. is not receiving any individualized treatment to treat his own individualized needs. (T 33) Dr. Lisota testified that E.W.F. suffers from anger management issues and sexual preoccupation issues. (T 31) However, E.W.F. is not undergoing any specific treatment to address these issues.

Its beyond comprehension how an untreated sexually

dangerous individual patient is ever going to get treated and discharged from the state hospital when he is only receiving five hours of treatment a week. Moreover, he is receiving absolutely no treatment for his individualized disorders and problems. Logically, since the state hospital treatment program has failed E.W.F. for the last ten years, E.W.F. should receive more treatment than the average SDI patient.

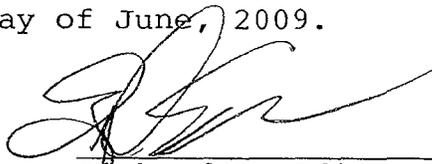
E.W.F. is at the state hospital for an indefinite period of time. It is impossible for E.W.F. to fall below the statutory threshold when 97% of the time, he is not been treated for his serious and dangerous sexual disorders. Unless the state is a retribution center, it defies logic that a sexually dangerous individual receives less treatment inside the state hospital than it would at a competent, outpatient facility.

The fact of the matter is that E.W.F. will never be released because the state hospital has no intention to provide him with a bona fide treatment program. It is impossible for E.W.F. with his diagnoses to be successfully treated with less than 45 minutes of treatment per day.

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the February 4, 2009 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 1st day of June, 2009.



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