

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

Matter of O.H.W.	)	
	)	
Cass County State's Attorney,	)	
	)	
Petitioner-Appellee,	)	
	)	
vs.	)	SUPREME COURT NO. 20090136
	)	
O.H.W.,	)	
	)	
Respondent-Appellant.	)	

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**APPELLANT'S BRIEF**

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APPEAL FROM THE APRIL 14, 2009 ORDER DENYING PETITION  
FOR DISCHARGE  
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA  
THE HONORABLE DOUGLAS R. HERMAN PRESIDING

ATTORNEY FOR APPELLANT

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**STATEMENT OF THE ISSUE PRESENTED**

- I. Whether the State proved its case by clear and convincing evidence where Dr. Coombs violated the Ethical Principles of Psychologists and Code of Conduct and where Dr. Coombs admitted he should not have conducted Respondent's evaluation?

**STATEMENT OF THE CASE**

Respondent-Appellant O.H.W appeals from the April 14, 2009 Opinion and Order Denying Petition for Discharge. Appellant seeks reversal on the grounds that the State did not sustain their burden of proof because they presented no credible evidence since Dr. Coombs was not an objective evaluator as mandated by the Ethical Principles of Psychologists and Code of Conduct.

In 2005, pursuant to N.D.C.C. § 25-03.3-01, Respondent was committed to the care, custody, and control of the executive director of the Department of Human Services.

On November 14, 2008, Respondent filed a request for a discharge hearing. (A-4)<sup>1</sup> Thereafter, Respondent was court appointed counsel. On January 12, 2009, Dr. Lincoln Coombs' SDI Annual Re-evaluation was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 97) On January 21, 2009, Dr. Robert Riedel was appointed to perform an examination of Respondent and be his expert

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<sup>1</sup> Appendix

witness for the trial. (Order For Appointment of Expert, docket sheet No. 103)

On April 8, 2009, a trial on the petition was heard before the Honorable Douglas R. Herman. The State offered the testimony of Dr. Coombs and his evaluation. Respondent chose not to call Dr. Riedel.

The day after the trial, Respondent filed a Motion to Strike and Motion for Judgment as a Matter of Law, moving the court to strike Dr. Coombs' entire testimony. Citing Standard 3.05 and Standard 3.06 of the Ethical Principles of Psychologists and Code of Conduct (hereafter referred to as "Ethics Code"), Respondent argued that Dr. Coombs' evaluation and testimony should be stricken because Dr. Coombs had a conflict which made him impaired and not an objective evaluator. (Motion to Strike and Motion for Judgment as a Matter of Law, docket sheet No. 108)

The State, in their response, quoted both Standards of the Ethics Code in their entirety and opposed the motion. (State's Return to Motion to Strike & Motion for Judgment as a Matter of Law, docket sheet No. 110)

On April 14, 2009, the Opinion and Order Denying Petition for Discharge was filed. Judge Herman found that "[O.H.W.] continues to be a sexually dangerous individual and his Petition for Discharge is **DENIED.**" (A-9) However, Judge Herman did not consider Standard 3.05 and Standard 3.06 of the Ethics Code or Respondent's arguments

contained in his motions:

"Post-hearing, [O.H.w's] attorney submitted a complete copy of Ethical Principles of Psychologists and Code of Conduct (American Psychologist, December 2002) in support of his Motion to Strike Dr. Coombs' testimony in its entirety. But that submission did not point the Court to any specific page or principle or standard. The Court is not inclined to search the document on its own." (A-7) (Opinion and Order Denying Petition for Discharge p. 3)

Thereafter, on April 29, 2009, Respondent filed his Notice of Appeal, appealing the Opinion and Order Denying Petition for Discharge. (A-10)

**STATEMENT OF THE FACTS**

The essential facts are not in dispute. At trial, the State's entire case consisted of Dr. Coombs' testimony and his SDI Annual Re-evaluation. (Exhibit # 1, SDI Annual Re-evaluation, docket sheet No. 112) (T 7)<sup>2</sup> Dr. Coombs testified that Respondent remains a sexually dangerous individual. (T 24) Dr. Coombs testified Respondent has been diagnosed with Antisocial Personality Disorder. (T 16) Dr. Coombs opined Respondent is likely to engage in further acts of sexually predatory conduct. (T 20-21) He further opined that Respondent would have serious difficulty

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<sup>2</sup> Trial Transcript

controlling his behavior. (T 22-24)

However, Dr. Coombs also disclosed that he had been involved in Respondent's treatment for approximately one year. (T 11) Dr. Coombs testified that he was still treating Respondent during part of the evaluation review period but "for the majority at least of the review period I was not his treater." (T 27, 11)

On direct examination, Dr. Coombs conceded that a psychologist who is involved in a sexually dangerous individual's treatment should not conduct the annual evaluation because of objectivity issues. (T 11-13, 25-26)

On cross-examination, Dr. Coombs admitted he should not have conducted Respondent's evaluation. (T 27-28) Dr. Coombs opined that professional standards dictated that he should not have done Respondent's evaluation. However, nevertheless, due to the lack of funding and staff at the North Dakota State Hospital, he conducted the evaluation. (T 39)

## ARGUMENT

- I. The State did not prove its case by clear and convincing evidence where Dr. Coombs violated the Ethical Principles of Psychologists and Code of Conduct and where Dr. Coombs admitted he should not have conducted Respondent's evaluation.

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 remains a sexually dangerous individual because the State presented no credible evidence at trial. All the evidence at trial should have been stricken from the record because Dr. Coombs violated Standard 3.05 and Standard 3.06 of the Code of Ethics. Pursuant to the Code of Ethics, Dr. Coombs was per se not objective when he evaluated Respondent. Moreover, Dr. Coombs admitted his objectivity could be questioned. (T 11, 25-27, 39)

Standard 3.05 of the Ethics Code provides:

"(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the

professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

(b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of

confidentiality and thereafter as changes occur."  
(attachment to Motion to Strike and Motion for  
Judgment as a Matter of Law, docket sheet No. 108)

Here, Dr. Coombs clearly violated subsection (a) because he was involved in a multiple relationship with Respondent. He was involved with Respondent's treatment and at the same time conducted Respondent's evaluation.

Dr. Coombs testified that he was extensively involved with Respondent's treatment for "about a year." (T 11) He testified that he was involved in Respondent's treatment until "about the time at the beginning of the review period." (T 11) According to Exhibit # 1, this would have been at least until December 2007. (Exhibit #1 page 4; SDI Annual Re-evaluation, docket sheet No. 112)

It is anticipated the State will argue that on January 8, 2009, the date the evaluation was completed, Dr. Coombs was no longer involved in Respondent's treatment and hence he was not acting in a dual role. This unsophisticated argument is wrong because Dr. Coombs' evaluation covers a time frame in which he was actively involved in Respondent's treatment! Dr. Coombs admitted for a time period covered in his evaluation he was directly involved in Respondent's treatment but "for the majority at least of the review period I was not his treater." (T 27)

Standard 3.06 of the Ethics Code provides:

"Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation." (attachment to Motion to Strike and Motion for Judgment as a Matter of Law, docket sheet No. 108)

Here, based on the evidence at trial, a clear violation of Standard 3.06 occurred. In fact, Dr. Coombs conceded his objectivity could be questioned:

"Q Let me ask this question. Do you know, is it standard operating procedure for a person involved in a person's treatment to actually then conduct an annual evaluation?

A It is optimal if the evaluator is not currently involved.

Q Why is that?

A An issue of trying to maintain objectivity."

[Trial transcript pp. 11-12]

Likewise, during cross-examination, Dr. Coombs admitted on four different occasions his objectivity could either "potentially" or "possibly" be questioned. (T 25-26)

Moreover, during cross-examination, Dr. Coombs conceded that Standard 3.06 dictated he should not have done the evaluation of Respondent:

"Q But obviously, you'd agree in an ideal situation, you should not have done the evaluation in this particular case since you were involved expressly with [O.H.W's] treatment, correct?

A Ideally. But, keeping in mind that for the majority at least of the review period I was not his treater.

Q But, the fact is, you were.

A I have been in the past, yes.

Q And so, you would agree that general methods in your scientific field, you should not under ideal circumstances, you should not have done the evaluation, correct?

A Ideally." [Trial Transcript pp. 27-28].

Q. "So, let me ask you the question again. Pursuant to the professional standards in your field, you would agree that if the North Dakota State Hospital had sufficient funding and staff, that ideally you would not have done the evaluation of Mr. Wardlow for the Court in this case, correct?

A Ideally, yes." [Trial Transcript p 39]

Psychologists must adhere to recognized principles in the scientific community and they must adhere to their

Ethics Code. Although it may not be politically correct, Dr. Coombs was required to adhere to these scientific principles and adhere to the Ethics Code even when it involved evaluating a sexually dangerous individual!

The Order Denying Petition for Discharge is not supported by clear and convincing evidence especially when Judge Herman did not even consider Respondent's Motion to Strike and Motion for Judgment as a Matter of Law.

Despite the fact that Respondent cited Standard 3.05 and Standard 3.06 of the Ethics Code in the first sentence of his motions and the State quoted both standards in their response, the court did not consider whether Dr. Coombs violated either standard before issuing its order:

"Post-hearing, [Respondent's] attorney submitted a complete copy of Ethical Principles of Psychologists and Code of Conduct (American Psychologist, December 2002) in support of his Motion to Strike Dr. Coombs' testimony in its entirety. But that submission did not point the Court to any specific page or principle or standard. The Court is not inclined to search the document on its own." (A-7) (Opinion and Order Denying Petition for Discharge p. 3)

Moreover, it is improper for the trial judge to consider facts not in evidence. State v. Demars, 2007 ND 145, 738 N.W.2d 486. In State v. Glaesman, 545 N.W.2d 178, 182 (N.D. 1996), this Court held it was

reversible error for the trial judge to "imagine" facts not in evidence.

Here, Judge Herman relied on facts not in evidence to justify his Opinion and Order Denying Petition for Discharge:

"Ordinarily, Dr. Coombs would not have been involved in treatment. But because of well publicized personnel shortages at the State Hospital Sex Offender Treatment Program, Dr. Coombs was called in to participate with another professional to keep Mr. Wardlow's group going." (A-7) (Opinion and Order Denying Petition for Discharge p. 3)

The only evidence that the North Dakota State Hospital had a personnel shortage was from the testimony of Dr. Coombs. (T 11, 39) "The well publicized" personnel shortage that Judge Herman refers to is not in record. It is unclear whether Judge Herman received this information from a media source or some other source. Nevertheless, what is clear is that Judge Herman relied on facts not in evidence and relied on an outside source to formulate the basis for his Opinion and Order Denying Petition for Discharge. Under the case law, this is clearly impermissible. It is ironic that Judge Herman based his Order, in part, on facts not in the record, but refused to even read the two cited professional standards which are the crux of the case.

In sum, the State did not sustain its burden of proof

when they did not produce any credible, objective evidence.  
Henceforth, this Court must reverse the Opinion and Order  
Denying Petition for Discharge.

**CONCLUSION**

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the April 14, 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 29th day of June, 2009.

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

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