

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

Matter of Jeffrey K. Wolff.)
Cass County State's Attorney,)
Petitioner-Appellee,)
vs.) SUPREME COURT NO. 20090210
Jeffrey K. Wolff,)
Respondent-Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE JUNE 15, 2009 ORDER FOR CONTINUED COMMITMENT
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE FRANK L. RACEK PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

- I. 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 Jeffrey K. Wolff appeals the June 15, 2009 Order for Continued Commitment. Respondent seeks reversal on the grounds the State did not prove by clear and convincing evidence that he has serious difficulty controlling his behavior.

On April 26, 2006, 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. (Order For Commitment, docket sheet No. 43)

Pursuant to N.D.C.C. § 25-03.3-18, on November 14, 2008, Respondent filed a request for a discharge hearing. (A-4)¹ Thereafter, Respondent was court appointed counsel and Dr. James H. Gilbertson was appointed to perform an examination and be his expert witness. (Order Appointing Attorney, docket sheet No. 71; Order For Appointment of Expert, docket sheet No. 78)

On February 2, 2009, Dr. Robert D. Lisota's SDI Annual Re-evaluation was filed with the Cass County District Court.

¹ Appendix

(SDI Annual Re-evaluation, docket sheet No. 77) Thereafter, on April 13, 2009, Dr. Gilbertson's Independent Psychological Assessment was filed with the Cass County District Court.

(Independent Psychological Assessment, docket sheet No. 88)

On May 27, 2009, a trial on the petition was heard before the Honorable Frank L. Racek. Dr. Lisota testified on behalf of the State. Respondent chose not to call Dr. Gilbertson. Nor did Respondent testify.

On June 15, 2009, the Findings of Fact, Conclusions of Law, and Order for Continued Commitment were filed. (A-5 to A-12) Judge Racek made detailed and specific findings. He found by clear and convincing evidence that Respondent continues to be a sexually dangerous individual and denied his petition for discharge. (A-12) On July 15, 2009, Respondent filed a Notice of Appeal, appealing the Order for Continued Commitment. (A-13)

STATEMENT OF THE FACTS

The essential facts are not in dispute. Respondent has engaged in sexually predatory conduct via his 1993 sexual assault conviction and 1996 attempted gross sexual imposition conviction. (A-6).

At trial, Dr. Lisota testified Respondent suffers from antisocial personality disorder with borderline traits. (T 12)² Dr. Lisota opined that Respondent is extremely psychopathic, scoring a 39 out of 40 on the psychopathy

² Trial Transcript

checklist. (T 11) Respondent is at high risk to reoffend by engaging in future sexually predatory conduct acts due to being a psychopath. (T 12, 16) Dr. Lisota also opined Respondent would have serious difficulty controlling his behavior. (T 25).

Dr. Gilbertson did not testify at trial. However, in his report, he opined Respondent would have serious difficulty controlling his behavior. (Independent Psychological Assessment, page 26, docket sheet No. 88)

However, the evidence is undisputed that Respondent has not engaged in any sexual acts or sexually predatory conduct during his four year stay at the North Dakota State Hospital. (T 30-31) Many sexually dangerous individuals engage in sex acts at the state hospital. (T 31) In fact, Dr. Lisota testified that it would not surprise him if 25% of the sexually dangerous individual patients engage in various sex acts at the state hospital. (T 32) Dr. Lisota further testified Respondent has not committed a sexually predatory act in the last 13 years. (T 39)

ARGUMENT

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

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 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.

Here, Judge Racek committed reversible error because clear and convincing evidence did not exist that Respondent has serious difficulty controlling his behavior. Respondent 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. As Dr. Lisota testified, sexually dangerous individual patients have ample opportunity at the state hospital to engage in sexually predatory conduct. (T 31) See also 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, Respondent has not engaged in any sexually predatory conduct in his four year involuntary confinement.

Moreover, the evidence is undisputed that Respondent has not committed a sexually predatory act in the last 13 years. (T 39) Obviously, this is the best evidence of his ability to control his sexually predatory conduct behavior.

The State did not prove by clear and convincing evidence that Respondent has difficulty controlling his sexually predatory conduct behavior. The evidence presented was pure speculation and conjecture. Dr. Lisota essentially admitted this by testifying the risk instruments only detect recidivism in the average sexual offender:

"Q Just because Mr. Wolff might be a bad person or even a criminal, and other than the fact that he has two prior convictions, what evidence do you have that Mr. Wolff is likely to commit another sexual predatory act?

A Excluding the forensic science that addresses sexual recidivism, I have no evidence." [Trial Transcript p. 39]

The fact of the matter is in four years at the state hospital, Wolff has 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, Wolff has not engage in sexual contact as defined in N.D.C.C. § 25-03.3-01(7). In four years at the state hospital, Wolff has not engage in sexually predatory conduct as defined in N.D.C.C. § 25-03.3-01(9). If Wolff had serious difficulty in controlling his behavior he would 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 June 15, 2009 Order for Continued Commitment and discharge him from the care, custody, and control of the executive director of the Department of Human Services forthwith.

Dated this 14th day of September, 2009.



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