

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matter of Jeffrey Wolff.)
Cass County State's Attorney,)
Petitioner-Appellee,)
vs.)
Jeffrey Wolff,)
Respondent-Appellant.)

SUPREME COURT NO. 20100290

IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 13 2010

APPELLANT'S BRIEF

STATE OF NORTH DAKOTA

APPEAL FROM THE AUGUST 11, 2010 ORDER FOR
CONTINUED COMMITMENT
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE JOHN C. IRBY PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

- I. Whether the State proved by clear and convincing evidence that Respondent has serious difficulty controlling his behavior?

STATEMENT OF THE CASE

Respondent-Appellant Jeffrey Wolff appeals the August 11, 2010 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 25, 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.

Pursuant to N.D.C.C. § 25-03.3-18, on May 24, 2010, Respondent filed a request for a discharge hearing. (A-1)¹ Thereafter, Respondent was court appointed counsel. (Order Appointing Attorney, docket sheet No. 109) On June 11, 2010, Dr. Sullivan's SDI Annual Re-evaluation was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 116) Pursuant to the June 16, 2010 Order, Dr. Robert Riedel was appointed to perform an examination of Respondent and be his expert witness for the trial. (Order to Appoint Dr. Riedel, docket sheet No. 117)

¹ Appendix

On July 20, 2010, a trial on the petition was heard before the Honorable John C. Irby. At trial, both experts testified and their reports were admitted into evidence.

On August 11, 2010, the Order for Continued Commitment was filed. Judge Irby ruled that Respondent continues to be a sexually dangerous individual. (A-15) Judge Irby found that Respondent "demonstrates serious difficulty in controlling his behavior even in a structured setting such as the North Dakota State Hospital. He has acted inappropriately toward staff and has been written up for rule violations several times." Page 4 of the Findings of Fact, Conclusions of Law and Order for Continued Commitment. (A-15)

Thereafter, on September 9, 2010, Respondent filed his Notice of Appeal, appealing the Order for Continued Commitment. (A-20)

STATEMENT OF THE FACTS

The essential facts are not in dispute. At the trial, the court took judicial notice that Respondent had engaged in sexually predatory conduct. (T 5)² Both experts testified that Respondent's primary mental disorder diagnosis is antisocial personality disorder. (T 11,13,60,62; Exhibit #1, docket sheet No. 126, pp. 6-7 and Exhibit #5, docket sheet No. 130, p. 28)

Dr. Sullivan testified that Respondent is likely to engage in further acts of sexually predatory conduct. (T 31-

32, Exhibit #1, docket sheet No. 126, pp. 7-8) She further testified that Respondent has serious difficulty controlling his behavior. (T 32-35, Exhibit #1, docket sheet No. 126, pp. 8-9.) Dr. Sullivan testified regarding Respondent's behavior over the past year:

"Over this past review period I have noticed that he's continued to break Unit rules, which would be the equivalent of breaking laws in the community. He has had his TV on after curfew. He has pirated cable TV. He left a location that he was ordered to stay in during a power outage while he was in the Intensive Care Unit, the most restrictive unit we have. He's -- and he's been repeatedly disrespectful to staff. He has been deceitful. He is impulsive, and he admits that he likes being impulsive and that's just the way he is. And he has been irritable and aggressive towards staff." [trial transcript pp. 13-14]

On the other hand, Dr. Riedel testified that Respondent is not likely to engage in further acts of sexually predatory conduct. (T 65, Exhibit #5, docket sheet No. 130, p. 46) Dr. Riedel testified that Respondent does not have serious difficulty controlling his behavior. "I think he has shown a reasonable ability to control his sexual behavior. I don't think he is very good at controlling his other antisocial behaviors." (T 66) He further testified that "I

did agree with Dr. Gilbertson's report from last year, that he is much more like your common criminal, much more like your typical criminal than he is a sex offender who meets the standards of this statute." (T 65)

ARGUMENT

- I. The State did not prove 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. at ¶ 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. The State must establish "a causal relationship or nexus between the individual's disorder and dangerousness, which indicates the individual's mental disorder is linked to an inability to control behavior." Matter of Rush, 2009 ND 102, ¶ 9, 766 N.W.2d 720. However, a diagnosis of antisocial personality disorder alone is not sufficient to establish a connection between the disorder and future dangerousness. There must be clear and convincing evidence that the disorder will cause the individual to have serious difficulty controlling his sexually predatory conduct behavior. Interest of J.M., 2006 ND 96, ¶ 10, 713 N.W.2d 518.

Here, the State did not prove that Respondent has serious difficulty controlling his sexually predatory conduct behavior. The State merely proved that Respondent is the typical, recidivist criminal who suffers from antisocial personality disorder.

Judge Irby's only finding of fact regarding Respondent's inability to control his behavior was that he "acted

inappropriately toward staff and has been written up for rule violations several times." (A-15) Judge Irby's entire analysis on the issue is as follows:

"Wolff also meets the factor of serious difficulty controlling his behavior as set forth in In re G.R.H., 2008 ND 222, ¶ 7, 758 N.W.2d 719. He has repeatedly demonstrated difficulty controlling his behavior by his actions while in treatment at the State Hospital. He has not progressed in his sex offender treatment. He has shown no empathy for his victims. He has psychopathic traits which make him an individual who is impulsive, sensation seeking, irresponsible, and violative of social and legal norms. According to Lynn Sullivan, Ph.D., expert of the State of North Dakota, she finds Wolff to still be likely to engage in future sexual predatory and should be returned to the director of DHS as a sexually dangerous individual. With no measure of supervision if he is released, given his disorder, he is a risk of not controlling his behavior and a risk to re-offend." (A-18 [emphasis added])

As Judge Irby's ruling indicates, the State did not establish a causal nexus between Respondent's antisocial personality disorder and future dangerousness. Instead, Judge Irby conclusionary found that Respondent would have serious difficulty controlling his behavior solely due to his

antisocial personality disorder. "With no measure of supervision if he is released, given his disorder, he is a risk of not controlling his behavior and a risk to re-offend." The aforementioned statement would apply to every single sexually dangerous individual who was diagnosed with antisocial personality disorder. Under Judge Irby's ruling, whenever the State satisfied the second prong of the statute by proving the individual suffered from antisocial personality disorder, the serious difficulty controlling behavior prong would automatically be satisfied. This is contrary to the holding in Interest of J.M. Moreover, it is repugnant to Crane. Respondent is just a "dangerous but typical recidivist" criminal who chooses not to follow laws or the North Dakota State Hospital rules. He is no different from the hundreds of criminals currently incarcerated in North Dakota who suffer from antisocial personality disorder.

The fact that Respondent steals cable tv, breaks hospital rules, and is disrespectful, rude, and obnoxious towards hospital staff does not prove that he has serious difficulty controlling his sexually predatory conduct. Instead, it illustrates that Respondent is the "dangerous but typical recidivist convicted in an ordinary criminal case."

Criminals who suffer from antisocial personality disorder get released from North Dakota prisons and jails on a weekly basis. However, under the State's position and

Judge Irby's ruling, sexually dangerous individuals with antisocial personality disorder can never be released because their mental disorder means they have serious difficulty controlling their behavior. This is contrary to Crane and mandates that Judge Irby's Order of Continued Commitment be reversed.

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the August 11, 2010 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 3rd day of December, 2010.



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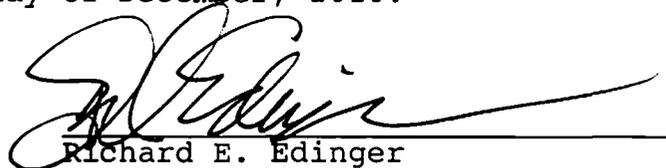
CERTIFICATE OF SERVICE

Richard E. Edinger hereby certifies and swears that:

On December 13, 2010, I served a copy of Appellant's Brief and Appendix onto Appellee.

I put a true and correct copy of the aforementioned documents in a first class postage prepaid envelope addressed to Mr. Birch P. Burdick, State's Attorney, at his last reasonably ascertainable post office address, that being P.O. Box 2806, Fargo, North Dakota 58108 and deposited the envelope in the U.S. mail in Fargo, North Dakota.

Dated this 13th day of December, 2010.



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