

20120253

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP - 4 2012

In the Interest of J.M.)
)
Burleigh Co. State's Attorney,)
)
)
Petitioner-Appellee,)
)
)
vs.)
)
)
J.M.,)
)
)
Respondent-Appellant.)

STATE OF NORTH DAKOTA

No. 20120253

APPELLANT'S BRIEF

APPEAL FROM THE MAY 3, 2012 ORDER
THE BURLEIGH COUNTY COURT IN BISMARCK, NORTH DAKOTA
THE HONORABLE THOMAS J. SCHNEIDER PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

- I. Whether the State's evidence was based on science where Dr. Krance testified she did not adhere to a generally accepted principle in the scientific community of psychologists before rendering a diagnosis on respondent?

STATEMENT OF THE CASE

Respondent-Appellant J.M. appeals the May 3, 2012 Order denying his petition for discharge. Respondent seeks reversal on the grounds 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 October 28, 2005, pursuant to N.D.C.C. § 25-03.3-01, J.M. 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 October 20, 2011, J.M. filed a request for a discharge hearing and Dr. Jennifer Krance's SDI Annual Re-evaluation was filed with the Burleigh County District Court. (A-14¹, SDI Annual Re-evaluation, docket sheet No. 134) Dr. Stacey Benson was appointed to be J.M.'s expert witness. (Amended Order For Appointment of Independent Examiner, docket sheet No. 153) On March 27, 2012, Dr. Benson's Report was filed. (Report, docket No. 160)

On April 5, 2012, the trial was held before the Honorable Thomas J. Schneider. Dr. Krance testified for the

¹ Appendix

State. Dr. Benson testified for Respondent. Judge Schneider took the matter under advisement and ordered the parties to submit proposed findings within 14 days. (T 112)²

On April 19, 2012, Respondent filed a Motion to Strike, "striking all of Dr. Krance's written report and testimony from the trial on the grounds that her entire diagnosis and evaluation of Respondent was based on pseudoscience and not science. Her methods in this particular case were not based on science where she did not adhere to generally accepted principles in the scientific community of psychologists." (Motion to Strike, p. 1, docket No. 167). The State did not file a response. On May 3, 2012, Judge Schneider issued his Order on Motion to Strike, denying the motion. (A-15) The fact that Dr. Krance did not adhere to generally accepted principles in the scientific community of psychologists "goes to the weight, not admissibility of Dr. Krance's testimony and report." (Order on Motion to Strike, p.3, Docket No. 171) (A-17) Judge Schneider issued his Findings and Order, ruling that Respondent remains a sexually dangerous individual. (A-18)

Thereafter, on May 31, 2012, Respondent filed his Notice of Appeal, appealing the Order denying his petition for discharge. (A-24)

STATEMENT OF THE FACTS

The essential facts are in dispute. Dr. Jennifer Krance, a licensed psychologist, testified that it is generally accepted in the scientific community of psychologists that prior to rendering a diagnosis on a patient, the psychologist is to review the entire file. Dr. Krance testified that it's the North Dakota State Hospital's policy to deviate from this generally accepted scientific standard. (T 50-51)

Dr. Krance testified that she did not review J.M.'s entire file for the review hearing. (T 48) In fact, Dr. Krance has not physically viewed the file. She could not provide an estimate on how many pages the file contains. (T 48) Dr. Krance testified that she reviewed a 24 page synopsis, past evaluations, progress notes, and some other documents. However, she admitted that she had not reviewed other key documents, including police reports. (T 48-50) Krance testified that the key to her diagnosis was the 24 page synopsis and its accuracy. Krance admitted that if errors existed in the synopsis that she could come to the wrong diagnosis on J.M. (T 53) Krance admitted that she did not independently test or review the accuracy of the synopsis. (T 52)

Krance testified that the only thing that she independently rescored was the MNSOST-R. J.M.'s original MNSOST-R score was incorrectly scored a 14. In 2010, after

Dr. Benson scored J.M. a 9 on the MNSOST-R, Dr. Krance rescored the test. (T 21-23, 77-78, Report, p. 28, docket No. 160, Exhibit R-1, p. 28) Despite the error in the original scoring of the MNSOST-R, Dr. Krance did not conduct an independent review of the synopsis. (T 52)

Krance testified that J.M.'s convictions for corruption of a minor and gross sexual imposition qualified as sexually predatory conduct. Krance testified that J.M. suffers from polysubstance dependence, Antisocial Personality Disorder, and also diagnosed him with Paraphilia, Not otherwise Specified. (T 7-9 and SDI Annual Re-evaluation, p. 1, docket sheet No. 134, Exhibit S-2, p. 1) Krance opined that J.M. is likely to engage in further sexually predatory conduct. (T 19) Krance also testified that J.M. would have serious difficulty controlling his behavior. (T 41)

Dr. Stacey Benson, a licensed psychologist, testified that she has conducted over 100 sexually dangerous individual evaluations. (T 73) Due to Dr. Belanger's legal problems, Dr. Benson performed sexually dangerous individual evaluations for the North Dakota State Hospital as an independent contractor. (T 73)

Dr. Benson testified that she had reviewed J.M.'s entire file prior to conducting the evaluation and diagnosis. (T 74-75). Dr. Benson testified the file is well over 2,000 pages. (T 75)

Dr. Benson agreed that J.M. met the first two elements

of being a sexually dangerous individual. (Report, p. 27, docket No. 160, Exhibit R-1, p. 27) However, Dr. Benson opined that J.M. is not likely to engage in further acts of sexually predatory conduct. Based on the actuarial scores and clinical judgment, she opined that J.M. is not likely to engage in future sexually predatory conduct. (T 77-81) Dr. Benson also testified that J.M. would not have serious difficulty controlling his own behavior. (T 81-85)

I. The State's evidence was not based on science where Dr. Krance testified she did not adhere to a generally accepted principle in the scientific community of psychologists before rendering a diagnosis on respondent.

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.

Evaluating the credibility of conflicting expert witness testimony is solely a function of the trial court. Matter of J.T.N., 2011 ND 231, ¶ 8, 807 N.W.2d 570. Generally, the trial court has discretion to choose between two permissible expert views. Id. However, the expert's opinion must be admissible under N.D.R.Ev. 702.

Rule 702 of the Rules of Evidence provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In State v. Hernandez, 2005 ND 214, ¶ 6, 707 N.W.2d 449, this Court rejected the adoption of a 702 Rule requirement that trial courts must exercise gate keeping functions required by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). Instead, this Court said the rule "envisions generous

allowance of the use of expert testimony if the witness is shown to have some degree of expertise." Id. at ¶ 8. "A trial court has broad discretion to determine whether a witness is qualified as an expert and whether the witness's testimony will assist the trier of fact." Id. Absent an abuse of discretion, the admittance of expert testimony will not be overturned. Id.

Despite this court's rejection of Daubert and its progeny, the plain language of 702 still applies. Under the plain language of 702, two requirements must be satisfied prior to admittance of evidence purporting to be based on a science: 1) it must be "scientific" and 2) the testimony must be by a qualified expert.

This court has consistently rejected polygraph examination evidence because the field of study fails the first requirement of the rule; it is not considered a science. See State v. Newman, 409 N.W.2d 79, 87 (N.D. 1987); State v. Weatherspoon 1998 ND 148, ¶ 8, 583 N.W.2d 391; and Sorenson v. Slater, 2011 ND 216, ¶ 15, 806 N.W.2d 183. "Based upon the lack of scientific acceptance of the reliability and accuracy of polygraph testing, courts have generally held that the results of a polygraph examination are not ordinarily admissible to establish the truth of statements made during the examination unless the parties have stipulated to admissibility prior to administration of the test." Id. This Court held it was reversible error in a

bench trial to allow evidence of a polygraph examination because the field of polygraph testing is not a science. Id. at ¶ 1.

Psychology is defined as “[t]he scientific study of the human mind and its functions, especially those affecting behavior in a given context.” Google, available at <http://www.google.com>. Psychology is a science.

Dr. Krance admitted that she did not adhere to the main principle in the scientific community of psychologists before rendering a diagnosis on a patient:

“Q. So is that generally accepted in the scientific community of psychologists to render an opinion and diagnosis without review the entire file?

A. For the purpose of the annual review --

Q. Okay. I am not asking if that’s the accepted practice in the North Dakota State Hospital. I am asking you, is that a general - - is that generally accepted in the scientific community of psychologists to render a diagnosis and give an opinion on somebody without reviewing the entire file? Yes or no?

A. No.” [Trial transcript, p. 50-51]

“Q. So you would agree the North Dakota State Hospital deviates from the general scientific community on this issue, correct? [Objection by Mr. Suhr, which was overruled by the court]

Q. (Mr. Edinger continuing). So once again, the policy

of the North Dakota State Hospital deviates from the general scientific community on this issue, correct?

A. In that sense, yes." [Trial Transcript p. 51]

Dr. Krance testified that she did not adhere to this generally accepted principal in the scientific community of psychologists. (T 48) In fact, Krance has never physically seen J.M.'s file at the state hospital! Krance admitted she did not review substantial portions of the file, but instead relied substantially on the 24 page synopsis. (T 48-50) The State did not attempt to rehabilitate her or ask her to clarify her failure to adhere to the generally accepted principles in the scientific community of psychologists. (T 70-71)

Here, Judge Schneider abused his discretion when he denied the Motion to Strike because Dr. Krance's diagnosis and opinion was not based on science. Based on Dr. Krance's own testimony, the scientific community of psychologists mandate that a psychologist review a patient's entire file before rendering a diagnosis and opinion on a patient. The North Dakota State Hospital cannot create their own science in their zeal to commit sexually dangerous individuals. Here, the noncompliance to the scientific method is even more egregious. Not only has Krance not read the entire file, she has never seen the file. There are literally hundreds and hundreds of documents in J.M's file that Krance has not reviewed. (T 48-50, 74-75)

Based on the science of psychology, the psychologist cannot make a valid and reliable diagnosis without reviewing all the information and facts. If a psychologist fails to adhere to the generally accepted principle in the scientific community when reviewing a patient's file in a particular case, even in a sexually dangerous individual case, she is no longer practicing science. Hence, under Rule 702, her testimony and diagnosis are inadmissible.

Dr. Krance is a scientist and expert in the field and thus satisfies the second requirement of Rule 702. However, in this particular case, Dr. Krance did not satisfy the requirement of the Rule that the evidence be "scientific" or based on science. It's analogous to a psychologist testifying about a polygraph examination or a coin flip test. Neither one is based on science and is therefore inadmissible even though the proponent is a scientist.

Here, Judge Schneider abused his discretion when he ignored the first requirement of the rule and instead ruled the evidence admissible solely because the proponent was a qualified expert. If a qualified expert does not adhere to the science she is trained in and readily admits she did not adhere to those particular scientific methods, then the evidence in that particular case is not admissible because it is not based on science.

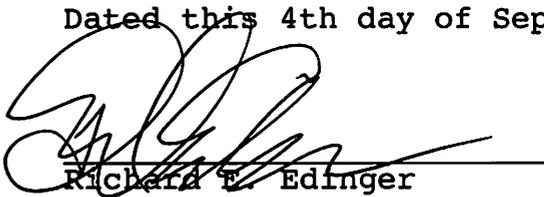
The plain language of Rule 702 mandates reversal. Two scientists testified at the trial. However, only Dr. Benson

applied science when she evaluated and rendered a diagnosis on J.M. Dr. Benson adhered to the generally acceptable principles in the scientific community. As such, the State did not prove by clear and convincing evidence that J.M. is likely to commit another sexually predatory act. The State did not prove by clear and convincing evidence that J.M. has serious difficulty controlling his behavior.

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the May 3, 2012 Order denying the 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 4th day of September, 2012.



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SEP -5 2012

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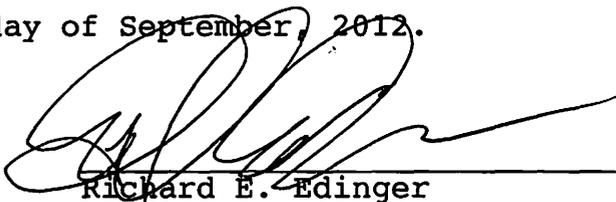
CERTIFICATE OF SERVICE

Richard E. Edinger hereby certifies and swears that:

On September 4, 2012, I served a copy of the 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. Lloyd C. Suhr, Assistant State's Attorney, at his last reasonably ascertainable post office address, that being 514 East Thayer Avenue, Bismarck, North Dakota 58501 and deposited the envelope in the U.S. mail in Fargo, North Dakota.

Dated this 4th day of September, 2012.



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