

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

| | | |
|-------------------------------|---|----------------------------|
| In the Matter of R.A.S. |) | |
| |) | |
| Cass County State's Attorney, |) | |
| |) | |
| Petitioner-Appellee, |) | |
| |) | |
| vs. |) | SUPREME COURT NO. 20080043 |
| |) | |
| R.A.S., |) | |
| |) | |
| Respondent-Appellant. |) | |

APPELLANT'S BRIEF

APPEAL FROM THE JANUARY 15, 2008 ORDER DENYING DISCHARGE
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE STEVEN E. McCULLOUGH PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES PRESENTED

- I. Whether the State proved by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct, when Dr. Gilbertson opined that Respondent was not likely to engage in further acts of sexually predatory conduct?
- II. Whether Respondent's substantive due process rights have been violated because his commitment proceeding is a mechanism for retribution and circumvents the criminal justice system where he was originally committed due to a pedophile's evaluation, the state hospital has a zero percent treatment rate, and where the State's expert admitted that North Dakota has the lowest standard in the country to commit?

STATEMENT OF THE CASE

Respondent-Appellant R.A.S. appeals the January 15, 2008 Order Denying Discharge. Respondent seeks reversal on the grounds that 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 his substantive due process rights were violated.

On August 19, 2004, pursuant to N.D.C.C. § 25-03.3-01, R.A.S. was committed to the care, custody, and control of the executive director of the Department of Human Services.

(Order For Commitment, docket sheet No. 41)

Pursuant to N.D.C.C. § 25-03.3-18, on October 18, 2007, R.A.S. filed a request for a discharge hearing. (A-4)¹ On the same day, Dr. Lynne Sullivan's SDI Annual Re-evaluation was filed with the Cass County District Court. (SDI Annual Re-evaluation, docket sheet No. 66) Thereafter, R.A.S. was court appointed counsel and Dr. James H. Gilbertson was appointed to perform an examination of R.A.S. and be his expert witness. (Order Appointing Attorney, docket sheet No. 68; Order For Appointment of Expert, docket sheet No. 80)

On January 14, 2008, a trial on the petition was heard before the Honorable Steven E. McCullough. Dr. Sullivan testified on behalf of the State. Dr. Gilbertson testified on behalf of Respondent.

On January 15, 2008, the Order Denying Discharge was filed. Judge McCullough found that the "State has shown by clear and convincing evidence that Respondent remains a sexually dangerous individual as defined in N.D.C.C. § 25-03.3-01." (A-5)

On February 12, 2008, Respondent filed his Notice of Appeal, appealing the Order Denying Discharge. (A-7)

STATEMENT OF THE FACTS

The essential facts are in dispute. Based on the evaluation of two state hospital doctors, on August 19, 2004, Respondent was committed as a sexually dangerous individual

¹ Appendix

under Chapter 25-03.3 of the North Dakota Century Code. (Findings of Fact, Conclusions of Law & Order for Commitment, docket No. 41) Dr. Joseph Belanger, one of the two state doctors who evaluated R.A.S., resigned from the State Hospital because he confessed to looking at child pornography on the internet. (Petitioner's Exhibit #5, docket No. 89)

While evaluating his sexually dangerous individual patients, Belanger admitted that he suffered "melancholic depressions and anxiety attacks." (Petitioner's Exhibit #6, docket No. 90) He conceded that he should not have done sexually dangerous individual evaluations due to his "own sexual issue" and because of being abused as a child. Id. Belanger also admitted that he was so depressed while evaluating the sexually dangerous individuals that he was suicidal and drank alcohol every night to fall asleep. To cope with his "issues," Belanger turned to child "pornography and masturbation as an outlet." Id.

At trial, Dr. James Gilbertson, opined that "when Dr. Belanger evaluated [R.A.S.] he was an impaired psychologist, an impaired professional and presumptively we believe an impaired psychologist has lost objectivity." (T 105)² Dr. Gilbertson further testified that he believed Belanger projected his own sexual deviant issues onto R.A.S. when he evaluated him. Hence, Belanger's evaluation of R.A.S. is not objective, nor scientifically accurate. (T 105-106).

On the other hand, the State's expert witness, Dr. Lynne

² Trial Transcript

Sullivan testified it was impossible for Belanger's sexual deviant behavior and multiple issues to have caused him to erroneously evaluate R.A.S. Dr. Sullivan denied that it is possible for Belanger to have projected his own sexual issues onto R.A.S. (T 62) Moreover, Dr. Sullivan also vehemently denied that being a pedophile could have effected Belanger's objectivity. (T 60-65)

At trial, the State relied on Dr. Sullivan's testimony, her SDI Annual Re-evaluation, and her SDI Re-evaluation Addendum. (State's Exhibit #2, docket No. 86; State's Exhibit #3, docket No. 87) Whereas, Respondent relied primarily on Dr. Gilbertson's testimony and his evaluation. (Petitioner's Exhibit #8, docket No. 92)

Dr. Sullivan opined that R.A.S. was likely to engage in further acts of sexually predatory conduct and needed to remain in the custody of the director of the Department of Human Services. (T 46, State's Exhibit #2, docket No. 86) Dr. Sullivan agreed with Dr. Etherington's and Dr. Belanger's original diagnosis. She opined that R.A.S. continues to have the diagnosis of at least paraphilia not otherwise specified with exhibitionistic and nonconsenting features. She further opined that R.A.S. continues to suffer from antisocial personality disorder and that he has an elevated risk for sexually violent offenses. (T 27-29, State's Exhibit #2, docket No. 86) Dr. Sullivan further testified that R.A.S. suffers from sadistic factors. (T 39-41,50)

On the other hand, Dr. Gilbertson opined that R.A.S. was not likely to engage in further acts of sexually predatory conduct. (T 107,114; Petitioner's Exhibit #8, docket No. 92, pp. 26-29) In fact, Dr. Gilbertson opined that R.A.S. should not have been initially committed. (T 113-114) This was based on the fact that the initial risk assessment instruments were miscalculated. (T 92-100, Petitioner's Exhibit #8, docket No. 92, pp. 10-26) Dr. Gilbertson opined that R.A.S. was not sadistic, but instead was your typical "mean and nasty" criminal. (T 90-92, Petitioner's Exhibit #8, docket No. 92, pp. 8-10)

At trial, Dr. Sullivan further testified that since 1998 approximately 60 individuals have been adjudicated as sexually dangerous individuals under Chapter 25-03.3 of the North Dakota Century Code and have been admitted to the North Dakota State Hospital. (T 67) Dr. Sullivan admitted that after ten years, none of the sexually dangerous individual patients have been successfully treated and released from the state hospital. Dr. Sullivan testified that currently only one patient out of sixty is at the level five treatment stage. (T 68)

Dr. Sullivan testified that based on what state's attorneys and Dr. Etherington have told her, North Dakota is the easiest state in the country to commit a sexually dangerous individual. North Dakota has the lowest standard to commit an individual. (T 21, 52-53)

ARGUMENT

- I. The State did not prove by clear and convincing evidence that Respondent is likely to engage in further acts of sexually predatory conduct, when Dr. Gilbertson opined that Respondent was not likely to engage in further acts of sexually predatory conduct?

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.

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 is likely to engage in further acts of sexually predatory conduct where Dr. Gilbertson opined that R.A.S. is not likely to engage in sexually predatory conduct. Clear and convincing evidence is a high standard of proof. Essentially, it is Dr. Sullivan’s testimony versus Dr. Gilbertson’s testimony.

Dr. Gilbertson’s credentials are very impressive and cannot be attacked or challenged. Moreover, he is a neutral, objective psychologist. Moreover, he adheres to the scientific evidence in the scientific community. He has forty years experience in the field of clinical psychology and has been a civil commitment examiner in Anoka County, Minnesota for the last 31 years. He is currently rostered with the Minnesota Attorney General’s Office as having specialized expertise in the assessment of sexual predators. Currently, Dr. Gilbertson is one of only nine doctors recognized in Minnesota as having expertise in the

field. In 1994, he was appointed by Governor Arnie Carlson to help draft Minnesota's sexual predator statute. (T 71-78, Petitioner's Exhibit #7, docket No. 91)

On the other hand, Dr. Sullivan is biased and her opinions are subjective. She is exclusively a State witness. (T 8) At trial, Dr. Sullivan's bias is illustrated on two different grounds.

First, her defense of Belanger. Even without Dr. Gilbertson's professional opinion that Belanger was an impaired evaluator, common sense would indicate that there would exist at least the possibility that Belanger's objectivity could be questioned. However, Dr. Sullivan's hardline stance on Belanger is a clear indication of her bias. She has a clear motive to defend Belanger--to protect the state hospital from civil lawsuits and civil liability.

Second, Dr. Sullivan blatantly ignores principles in the general scientific community. The scientific studies and journals indicate that a sexual offender ages out of reoffending. Once an sexual offender reached the age of 40, there is a 12% decrease in sexual offense recidivism. (Petitioner's Exhibit # 8, docket No. 92, p. 28.)

Here, according to the scientific evidence, because R.A.S. is now 41 years old, he has a significant decline in his sexual offense recidivism. (T 13) However, Dr. Sullivan attempts to minimize this. And in fact, claims that she is unaware of any scientific studies which support this

theory. (T 12-13, 47)

Dr. Sullivan's failure to adhere to general principles in the scientific community is also evident in her scoring of the Static-99. Sullivan readily admitted that she uses the original 1999 scoring rules, instead of the more modern 2003 scoring rules. (T 24). However, Dr. Sullivan admitted that the 2003 scoring rules are "much more detailed and may provide additional direction as to whether certain events that occurred within institutional placements should be counted against the person." (T 24) Dr. Sullivan conceded she had no idea what R.A.S.'s score would be under the 2003 Static-99 rules. (T 24,52) Moreover, Dr. Sullivan is not familiar with whether the scientific community uses the 2003 Static-99 scoring. (T 51-52)

In sum, the State did not prove by clear and convincing evidence that R.A.S. is likely to engage in further acts of sexually predatory conduct. This Court cannot be convinced the order is supported by clear and convincing evidence where Dr. Gilbertson opined that R.A.S. is not likely to engage in further acts of sexually predatory conduct. And where the State's only witness is clearly biased.

II. Respondent's substantive due process rights have been violated because his commitment proceeding is a mechanism for retribution and circumvents the criminal justice system where he was originally committed due to a pedophile's evaluation, the state hospital has a zero percent treatment rate, and where the State's expert admitted that North Dakota has the lowest standard in the country to commit.

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.

Issues not raised in the trial court will not be considered for the first time on appeal. Roise v. Kurtz, 1998 ND 228, ¶ 9, 587 N.W.2d 573. During the trial, Respondent’s counsel citing Kansas v. Hendricks, objected to a question. (T 38) Moreover, during his closing argument, Respondent’s counsel cited Kansas v. Hendricks and argued that “to comport with substantive due process of law, the State also has to show that [R.A.S.] is different from the average sex offender and he cannot control his behavior.” (T 131) The fact that Respondent did not more fully develop the argument can be attributed to the severe time constraints that the court imposed on the parties. The court kept informing the parties that the trial would be completed by 5:00 p.m. (T 118,122) Moreover, each side was given only three minutes for closing argument. (T 129) Despite the time constraints, Respondent did raise the substantive due process issue at trial.

Here, as applied to R.A.S., the commitment proceeding clearly 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 the original commitment proceeding was poisoned by a pedophile's evaluation and because R.A.S.'s commitment is for an indefinite period of time.

Originally, when R.A.S. was committed, Chapter 25-03.3 required the evaluation and testimony of two experts before a sexually dangerous individual could be committed. (T 14) Now, it comes to light that Belanger was a pedophile and an impaired evaluator when he evaluated R.A.S. (T 105-106) Most importantly, the State would not have met their burden if the court had disregarded Belanger's evaluation because they would not have satisfied the requirement of two experts.

Contrary to the respondent in Hendricks, in practice, R.A.S.'s stay at the hospital is for an 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 R.A.S.'s substantive due process rights.

First, in ten years, the state hospital has a 0% success rate in treating sexually dangerous individuals! Approximately 60 sexually dangerous individuals have been admitted in the last 10 years. And no one has been released.

Moreover, only one patient is currently at a level five stage. (T 67-68) This illustrates that the state hospital is a retribution center, not a treatment center.

Second, as Dr. Sullivan testified, North Dakota has the lowest standard in the country to commit a sexually dangerous individual, i.e., it is the easiest state in the country to commit an alleged sexually dangerous individual. Unlike other states, North Dakota affords respondents less procedural and due process safeguards. (T 21, 52-53) For example, currently, the State only has to have one expert to support its petition to commit, instead of the prior requirement of two experts.

Third, the state hospital doctors are biased, government witnesses, instead of objective doctors in the scientific community. This is illustrated by Dr. Sullivan attempting to protect Dr. Belanger's findings at all costs. The state hospital doctors will do whatever it takes to ensure that the sexually dangerous individuals remain at the state hospital. The fact that a pedophile helped commit over a dozen sexually dangerous individuals, does not deter the state hospital at all or cause them to reevaluate their procedures.³ Instead, they simply defend his actions at all costs. This illustrates that the state hospital is a retribution center, not a treatment center. The state hospital has no interest in treating sexually dangerous individuals. Instead, its sole interest is keeping them incarcerated.

³ Per the published opinions in North Dakota.

CONCLUSION

WHEREFORE, the reasons stated herein, Respondent respectfully requests that this Honorable Court reverse the January 15, 2008 Order Denying Discharge and discharge him from the care, custody, and control of the executive director of the Department of Human Services forthwith.

Dated this 23rd day of May, 2008.

A handwritten signature in cursive script, appearing to read 'R. E. Edinger', written over a horizontal line.

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