

In the Supreme Court of the State of North Dakota

State of North Dakota)	
Appellee, Petitioner)	
)	
v)	20180189
)	
William Carter)	
Appellant, Respondent)	

Appellee's Brief

Carter appeals the *Findings of Fact Conclusions of Law, and Order Denying Discharge* from civil commitment as a sexually dangerous individual entered in District Court, Stutsman County, 47-06-R-290, Judge Cherie Clark presiding.

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Issue Presented for Review

1. Whether Carter has been shown to have serious difficulty controlling his behavior that distinguishes Carter from the typical recidivist in the ordinary criminal case.

Statement of the Case and Nature of the Case

2. Carter appeals the denial of his motion for discharge from civil commitment.
3. Carter concedes he has engaged in sexually predatory conduct and that he has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder or dysfunction. *Brief of Appellant* ¶ 10.
4. Carter is clearly arguing the “State failed to prove Carter poses more of a threat than the “typical criminal recidivist.” *Brief of Appellant* ¶¶ 11, 14.
5. It is unclear whether Carter is arguing the court erroneously found Carter has serious difficulty controlling his behavior. *Brief of Appellant* ¶ 2 [generally states the issue is whether Carter remains a sexually dangerous individual], ¶ 5 [states as fact that the parties “. . . differed on the question of whether prong three was satisfied and whether Carter has serious difficulty controlling his behavior. . . .”], ¶¶ 9, 11, 12 [generally identifies that difficulty controlling behavior is an issue in SDI cases].

Course of Proceedings and Disposition Below

6. The petition for civil commitment was filed in 2006. 47-06-R-290 Index # 1. Independent Examiner, Dr. Robert Gulkin concluded: Carter had met statutory requirements for being considered a Sexually Dangerous Individual, Carter was

diagnosed as a pedophile, and Carter was likely to engage in future acts of sexual predatory behavior. 47-06-R-290 Index # 20 at 15. Both the State's experts, doctors Belanger and Sullivan, concluded Carter had perpetrated sexually predatory conduct, suffered from a mental disorder, and was likely to re-offend. 47-06-R-290 Index ## 14 at 8, 15 at 7.

7. An order for civil commitment was filed by the district court in 2007. 47-06-R-290 Index ## 30-31.
8. An annual review hearing was held on the 18th of November 2009. Dr. Lynn Sullivan, the State's examiner, authored a report received in evidence in which she concluded Carter is likely to engage in further acts of sexually predatory conduct. 47-06-R-290 Index #47 at 18. Independent examiner Dr. Robert Riedel's report was received in evidence as Respondent's Exhibit 1 and in it Dr. Riedel purposely avoided providing an opinion on whether Carter was likely to have future events of sexually predatory conduct. 47-06-R-290 Index #48 at 47. The court declined Carter's request for discharge. 47-06-R-290 Index ## 54-57. Carter filed a tardy notice of appeal and his appeal was dismissed by the Supreme Court of the State of North Dakota on the 4th of August 2010 due to being tardy. 47-06-R-290 Index # 69.
9. Carter moved for discharge in January of 2011. 47-06-R-290 Index # 70. A discharge hearing was held on the 16th of September 2011. The report of the State's expert, Dr. Lisota was received. 47-06-R-290 Index # 84. Lisota concluded Carter was likely to re-offend. 47-06-R-290 Index # 84 at 14.

Independent examiner Dr. Benson's report was received in evidence. 47-06-R-290 Index # 87. Benson concluded Carter was not likely to engage in further acts of sexually predatory conduct. Index # 87 at 39. Dr. Benson noted she evaluated Carter in 2008 and found that Carter "did meet criteria". 47-06-R-290 Index # 87 at 11. Dr. Benson's 2008 report is at 47-06-R-290 Index # 34. In 2008 Dr. Benson stated,

However, the best argument for the commitment of Mr. Carter lies in his high psychopathy score and his sexual deviancy. While his actuarial assessments do not indicate the level of risk typically associated with civil commitment, high psychopathy scores paired with high sexual deviancy is one of the best predictors for future reoffending. This combination is a better predictor than high risk on the RAI's.

47-06-R-290 Index # 34 at 16. The district court denied Carter's motion for discharge. 47-06-R-290 Index # 88.

10. Carter moved for discharge on the 26th of June 2012. 47-06-R-290 Index # 90. Dr. Krance's report was received in evidence. 47-06-R-290 Index # 103. Dr. Krance concluded Carter would likely experience serious difficulty controlling his behavior if released to the community without supervision at this time and that Carter is likely to engage in further acts of sexually predatory conduct. 47-06-R-290 Index # 103 at 22. Independent examiner, Dr. Benson concluded Carter is a pedophile and has anti-social personality disorder but distinguished her 2008 opinion he was likely to engage in sexually predatory conduct and found Carter not likely to re-offend sexually. 47-06-R-290 Index # 108, pp 35-40. The district court denied Carter's request for discharge. 47-06-R-290 Index # 109.

11. Carter applied for discharge in 2013. 47-06-R-290 Index # 113. Dr. Sullivan reported for the State that she concluded Carter was likely to re-offend sexually. 47-06-R-290 Index # 135 at 16. Independent examiner, Dr. Benson, concluded Carter was not likely to re-offend sexually. 47-06-R-290 Index # 140 at 47. The district court denied Carter's request for discharge. 47-06-R-290 Index # 141.
12. Carter applied for discharge in 2015. 47-06-R-290 Index # 142. Dr. Krance's report was received as Petitioner's Exhibit 2. 47-06-R-290 Index # 156. Dr. Krance concluded Carter was likely to re-offend sexually. 47-06-R-290 Index # 156 at 29. Independent examiner, Dr. Benson's report was received as Respondent's Exhibit 2. 47-06-R-290 Index # 161. Dr. Benson concluded Carter was unlikely to reoffend sexually. 47-06-R-290 Index # 161 at 55. The district court denied Carter's application for discharge. 47-06-R-290 Index # 164. Carter appealed. The Supreme Court of the State of North Dakota affirmed the district court's denial of Carter's application for discharge. *Interest of Carter*, 2017 ND 18, 891 N.W.2d 778.
13. In February 2017 Carter moved for discharge. 47-06-R-290 Index # 173. On the 19th of May 2017, Dr. Erik Fox's *Sexually Dangerous Individual Annual Evaluation*, completed on the 16th of May 2017, was filed with the court. Index # 184. State's expert, Dr. Fox found that William Carter is a sexually dangerous individual. Index # 184, 30. Dr. Fox went on to say, "Nonetheless, Mr. Carter has gained a number of skills in treatment, and a step down to a less restrictive environment could be accomplished while still providing protection for the

community and treatment for Mr. Carter.” Transcript of Proceedings March 19, 2018 [hereinafter T] at 78:15; Index # 184, 29. Dr. Fox specified he would want to see continued sex offender treatment and GPS monitoring as part of that less restrictive setting. Index # 184, 29.

14. On the 1st of September 2017, independent examiner Dr. Stacey Benson’s report of examination completed on the 21st of August 2017, was filed with the court. Index # 186. Dr. Benson found that Carter “. . . is not likely to engage in acts of Sexually Predatory Conduct and as such, does not meet the NDCC definition of a Sexually Dangerous Individual.” Index # 186, 50.
15. On the 3rd of September 2017, Dr. Fox’s *Sexually Dangerous Individual Annual Evaluation, Addendum Report* completed on the 2nd of September 2017 was filed. Index # 188. In the *Addendum*, Dr. Fox took into account incidents that occurred in July 2017, after Fox had submitted his 16 May 2017 report. T 78:21. Fox testified Carter purchased a swimsuit [bikini top & bottom] at a store without authorization, Carter possessed a catalogue with pictures of prepubescent children in it was found in Carter’s property, and Carter had too much money, more than Carter was authorized to have. T 78-79. In the *Addendum*, Dr. Fox continued to hold the opinion that Carter is a sexually dangerous individual but revised his opinion that Carter could appropriately be treated in a less restrictive setting. “My prior recommendation for post commitment community placement is also changed as a result of recent events indicating a continued difficulty controlling behavior and high risk behaviors related to his pedophilic interests.” Index # 188,

4.

16. The discharge hearing was held on the 19th of March 2018. Attorney Tyler Morrow appeared for William Carter, State's Attorney Fritz Fremgen appeared for the Petitioner. Dr. Eric Fox appeared and testified as did Dr. Stacey Benson.

Statement of facts

17. The State disagrees with the Appellee's edition of the facts because the Appellee's edition is lacking substantial material facts.
18. Dr. Fox testified that Carter's pedophilia is a compulsive behavior and gave some examples. Dr. Fox recounted that Carter had been in possession of cut outs of juveniles while Carter was at the North Dakota State Penitentiary. *Transcript of Proceedings* March 19, 2018 [hereinafter T] at 44-45. The cut outs were hidden among the pages of a Playboy magazine. *Id.*; Index # 184, 9. Both items were contraband in the penitentiary. Fox noted not only were these rule violations, but if other inmates discovered Carter was sexually interested in children, Carter could face personal security risks. T 46. Still Carter violated the rules and risked discovery.
19. Dr. Fox testified that Carter acknowledged Carter had masturbated to the non-pornographic photograph of a roommate's juvenile niece in 2014 while committed to the North Dakota State Hospital's Secure Services Unit. T 48 Index# 188, 2, ¶ II B. Carter reported he thought the niece in the image was about 9 years old, which Dr. Fox noted was the age of Carter's victim in the index offense. *Id.* Dr. Fox testified the fact that Carter would take his roommate's property, a rule

violation, and masturbate to a 9 year old's image, was indicative of Carter's compulsive pedophilia. T 49:14. Dr. Fox testified this showed a lack of ability to exercise self control. T 48-49.

20. After the 2014 masturbation incident, but still while committed to the State Hospital, Carter was once again found in possession of photographs of prepubescent children for masturbatory stimuli. Index# 184, 13.
21. More recently, in July of 2017, Carter was again found in possession of images of prepubescent juveniles, this time a Marcus Uniforms Fall 2015 catalogue. T 79; received as State's Exhibit 10, Index# 207. At the time of discovery of the catalogue, also found were a cut-out of a college aged woman in a sport jersey top and a cut-out of what appears to be an adult model in underwear or a bikini top. Id.; T85-86. Although the catalogue was non-pornographic, it depicted prepubescent children in school uniforms. The catalogue and images of young women were received in evidence at the March 2018 discharge hearing as State's Exhibit 10. Index# 207. Dr. Fox testified the Marcus catalogue was a concern for Dr. Fox because the catalogue contained pictures of prepubescent girls and that category has been Carter's target for sexual arousal. T84:23. Fox detailed, Carter had similar pictures when Carter was in prison, T84:25, and Carter had the picture of his roommate's nine year old niece, T85:3.
22. Additionally, Carter was in possession of a bikini or halter top and bikini bottoms. Carter acknowledge he bought them without getting approval. T 80:7-11; Index # 188, 3. Dr. Fox testified Carter had been in the female undergarment section at

Walmart two months before the unauthorized swimsuit purchase T 79:24. Carter bought a swimsuit that was the wrong size for Carter. T 80:7. Dr. Fox testified that buying a bikini the wrong size is an instrument for sexual arousal. T 81:16. Carter reported he'd gotten the wrong size because he was in a hurry and didn't want his escort to notice he was buying female swimsuit. T 80:7. Dr. Fox testified that the preparation to buy the female swimsuit and then the surreptitious purchase of it were "... really notable to me." T 80:5 Dr. Fox explained,

It also indicated to me there was thought and planning and recognition of the inappropriateness of the behavior. So that together meant he wasn't controlling his behavior, and he was higher risk than I initially thought and that he wasn't at the stage of treatment completion that would warrant community placement at this time.

T 80:13. Fox found it alarming that a person with all the years of treatment behind him that Carter had, would take the risk, buy the wrong sized bikini, even when he knows he's being evaluated for release for discharge. T 80-81.

23. Dr. Fox testified that Carter was demoted to Level 1 of treatment after the bikini, cash, and juvenile magazine incidents. Fox testified the was concerned with how Carter responded to the demotion. Carter reportedly clenched his fists and took an aggressive posture. T 82:6. Fox said he appreciated a demotion was frustrating, but thought Carter didn't have an awareness of his misbehavior. T82:12. Fox testified he was also concerned with Carter's demonstrated lack of control. T82:17. Fox compared it with getting a speeding ticket saying we know we've done wrong but we be respectful, avoid making matters worse, we don't posture

aggressively. T83:10. Fox was not satisfied with Carter's lack of implementation of his years of training in the facility. T83:12.

24. Carter was also found in possession of too much cash, in violation of policy. T 79:4. Dr. Fox testified, "Those rule infractions were certainly him not following the rules, but the things that really stood out to me were the possession of the images of prepubescent children given his history." T 79:7.
25. Dr. Benson testified about Carter buying the bikini: "certainly there's a concern that he didn't follow the rules; that he requested the swimsuit and didn't wait until he bought it." T 181:10.
26. Dr. Benson noted she had more concerns about the Marcus catalogue than the cash and swim suit violations. T 222:7-14. Benson expressed the following about the catalogue. "This has been a consistent issue for Mr. Carter, going back to his time at the NDSP when he was found with pictures of young children in his treatment homework and in 2015 when he masturbated to his roommate's picture of his niece." Index# 186, 27-28. Benson testified about the magazine:
- A. I saw the money and the bathing suit more as a rule violation, but it did not necessarily strike me as indicative of potential continuation of his pedophilic fantasies.

The magazine is something that I do not know how long he had it, and I don't know if he was using the magazine because there are also adult clothes and an individual can order out of it. But even giving him the benefit of the doubt, somebody who has been in treatment and who is advanced as far as he has, **it showed, in my opinion, very poor judgment for him to keep a magazine of that nature given the fact that he has masturbated to images of children before and that could be a risky situation for him.**

T 222:11

27. Dr. Benson acknowledged that Carter has managed to find a way in the secured settings of the North Dakota State Penitentiary and the North Dakota State Hospital, to commit rule violations by having prepubescent images. T220:20-221:4.
28. Dr. Benson's own stated opinion is that Carter is a moderate to high risk to re-offend. T 213:12; 214:2.
29. Dr. Fox evaluated Carter using the Static-99R. Index# 184, 15. Fox reported Carter's score of +5 Level IVA places Carter in the 88.7 percentile. Id.; T 63-64. Fox pointed out Dr. Benson also scored Carter as a +5 on the Static-99R. T 63:23. Fox explained 85% of sex offenders score lower, 7.6% score higher, and about 7.4% score the same as Carter. Dr. Fox testified "... on page 16 ... I identified that the individuals with 5s recidivated at 21 percent approximately after 5 years and 32 percent after 10 years." T 66:3. Dr. Fox reported, "Mr. Carter would be expected to be approximately three times (2.70) the recidivism rate of the typical sexual offender (defined with the median score of 2)." Index# 184, 15.
30. Dr. Fox explained that the Static-99R has been further refined through the application of sets of norms, either the "Routine Norms" or the "High Risk/Need Norms". Index# 184, 16; T 66:17. Fox explained he evaluated Carter using the Structured Risk Assessment-Forensic Version (SRA-FV) and discovered that Carter scored a 3.38, which demonstrated Carter has a high density of external

risk factors and support the use of the High Risks/Need Norms group for Carters Static-99R results. Index# 184, 16, 19 ¶ 1; T 68-69. Fox explained groups with a Static-99R score of +5 Level IVA who are also found to be in the High Risks/Need Norms have been found to sexually re-offend at a rate of 21.2% in five years and 32.1% in ten years. Index# 184, 16, ¶ 4; T 69:15. Dr. Fox's opinion is that Carter was likely to re-offend sexually. T 55.

31. Dr. Benson also evaluated Carter using the Static-99R and, like Fox, scored Carter at a +5 Level IVA. Index # 186, 31 (last line of table); 34 ¶ 3; T 201:9.
32. Dr. Benson evaluated Carter with the SRA-FV and scored him a 3.22 high risk. Index# 186, 47. However, Benson cited recent criticism for applying the High Risks/Need Norms group without "strong case specific justification" and applied the Routine Norms group to Carter. Index# 186, 34 ¶ 1. Consequently, Benson's data indicated only a 15.2% chance of re-offending sexually in the next 5 years. Index# 186, 34.
33. Carter himself placed his "percentage chance of committing another sexual offense" at 20%. Index # 184, 12.

Standard of Review for order denying petition for discharge

34. The standard of review for an order denying a petition for discharge from civil commitment as a sexually dangerous individual follows.

This Court reviews civil commitments of sexually dangerous individuals under a "modified clearly erroneous" standard of review. *Interest of Tanner*, 2017 ND 153, ¶ 4, 897 N.W.2d 901. We will affirm a district court's order denying a petition for discharge unless it is induced by an erroneous view of the law or

we are firmly convinced it is not supported by clear and convincing evidence. *Id.*; *Matter of Wolff*, 2011 ND 76, ¶ 5, 796 N.W.2d 644. We accord “great deference to the [district] court’s credibility determinations of expert witnesses and the weight to be given their testimony.” *Tanner*, at ¶ 4; *Wolff*, at ¶ 5.

At a discharge hearing, the State must prove by clear and convincing evidence that the committed individual remains a “sexually dangerous individual” under N.D.C.C. § 25-03.3-18(4). *Matter of Hehn*, 2015 ND 218, ¶ 5, 868 N.W.2d 551. Under N.D.C.C. § 25-03.3-01(8), the State must prove three elements:

(1) the individual has engaged in sexually predatory conduct; (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction; and (3) the disorder makes the individual likely to engage in further acts of sexually predatory conduct.

Tanner, 2017 ND 153, ¶ 4, 897 N.W.2d 901. Further, “the United States Supreme Court held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior.” *Matter of Hehn*, 2008 ND 36, ¶ 19, 745 N.W.2d 631 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)). We therefore construe “sexually dangerous individual” as meaning “proof of a nexus between the requisite disorder and dangerousness encompasses proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.” *Wolff*, 2011 ND 76, ¶ 7, 796 N.W.2d 644 (quoting *Interest of J.M.*, 2006 ND 96, ¶ 10, 713 N.W.2d 518).

In the Interest of Voisine, 2018 ND 181, ¶¶ 5-6, 915 N.W.2d 647, 651–52.

Argument

35. Carter’s argument that there was only one rule violation overlooks the rule violations with the bikini purchase and having too much cash. Dr. Fox saw the bikini purchase as one of attempting to surreptitiously gain arousal materials. Dr.

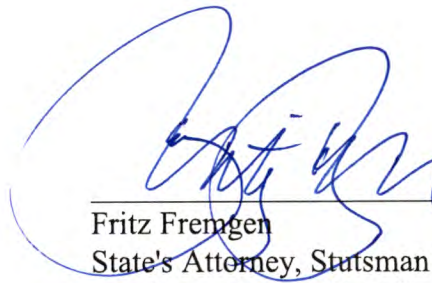
Benson didn't see it that way. Dr. Fox saw Carter's response to demotion as demonstrative of a failure to implement his skills training.

36. Carter's characterization of the possession of the prepubescent images of children in the Marcus catalogue as nothing to worry about far exceeds the support of his own expert. Dr. Benson testified, "But even giving him the benefit of the doubt, somebody who has been in treatment and who is advanced as far as he has, **it showed, in my opinion, very poor judgment for him to keep a magazine of that nature given the fact that he has masturbated to images of children before and that could be a risky situation for him.**" Dr. Fox found possession of the magazine to be even more of a concern than Benson. Both view it with such concern because they recognize it is a continuation of Carter's pattern of finding a way to get at images of prepubescent girls in a controlled environment.
37. Benson acknowledged Carter has had significant problems in a controlled environment at Luther Hall and has had significant problems in a controlled environment at the North Dakota State Penitentiary. T 186-187. This is one of the reasons Dr. Benson still diagnoses Carter with not only the pedophilia but also anti-social personality disorder. T186-187.
38. Dr. Benson acknowledged the idea that most juvenile only sex offenders do not re-offend is a concept for typical juvenile sex offenders who don't have a paraphilia; but that it is reasonable to consider that idea less applicable to atypical juvenile sex offenders like Carter who have pedophilia. T 217.

Conclusion

39. Carter is not the “. . . dangerous but typical recidivist in the ordinary criminal case.” *Interest of J.M.*, 2006 ND 96, ¶ 10, 713 N.W.2d 518. Maybe the typical criminal has an anti-social personality disorder like Carter does, but the typical criminal does not have a paraphilia like Carter does. Carter is a pedophile and he still takes alarming risks to satisfy his pedophilia. Carter continues to find ways in a secured environment to get at materials he shouldn’t have. Dr. Benson acknowledged, If Carter will do that knowing he is being monitored and assessed for release, that’s remarkable risk taking. T 223-224.
40. The State asks the Court to affirm the order denying the petition for discharge from civil commitment as a sexually dangerous individual.

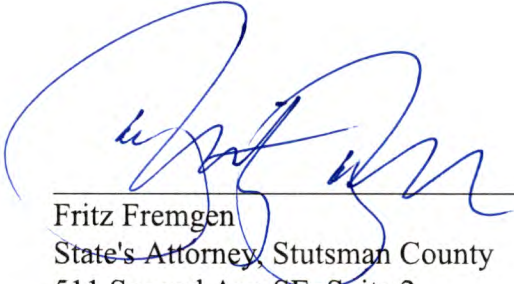
Dated the 19th day of October 2018.



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CERTIFICATE OF SERVICE

41. On the 19th of October 2018, the *Appellee's Brief* was served by e-mail to Tyler Morrow, attorney for the Appellant, at service@kpmwlaw.com
42. On the 19th of October 2018, the *Appellee's Brief* was filed electronically with the Clerk of the North Dakota Supreme Court by e-mailing to:
supclerkofcourt@ndcourts.gov



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