IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. ~~20070033~~
Burleigh County District Court No. 06-K-0660

Cynthia Feland and State of North Dakota,)
)
Petitioner/Appellee,)
)
vs.)
)
P.F.,)
)
Respondent/Appellant.)

APPELLANT'S BRIEF

Appeal from the Order Denying Motion to Determine
Constitutionality, Dated April 20, 2007, and
Findings of Fact and Order for Commitment
Entered on April 30, 2007

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STATEMENT OF FACTS

The facts underlying the original commitment of P.F. are found at ***In the Interest of P.F.,*** 2006 ND 82, 712 N.W.2d 610.

There are no new facts pertinent to this appeal.

STATEMENT OF PROCEEDINGS

On February 26, 2007, P.F. filed a Motion for Determination of Constitutionality of Statute. On March 12, 2007, and March 14, 2007, respectively, the North Dakota Attorney General and the State of North Dakota filed their response to the motion.

On March 15, 2007, a hearing on the motion was held in Burleigh County District Court, the Honorable David Reich presiding. On April 20, 2007, the Court issued its Order. On May 10, 2007, P.F. filed a Notice of Appeal.

ISSUES

1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT DETERMINED THAT SECTION 25-03.3-17, N.D.CENT.CODE WAS NOT AN UNCONSTITUTIONAL DELEGATION OF JUDICIAL AUTHORITY?

2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT DETERMINED THAT CHAPTER 25-03.3 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND NORTH DAKOTA CONSTITUTIONS?

LAW AND ARGUMENT

1. The trial court committed reversible error when it determined that Section 25-03.3-17, N.D.Cent.Code was not an unconstitutional delegation of judicial authority.

Section 25-03.3-17(1) N.D.Cent.Code provides as follows:

> 1. A committed individual must remain in the care, custody, and control of the executive director, until, in the opinion of the executive director, the individual is safe to be at large.

[Emphasis added].

Subsection 4 of Section 25-03.3-17 further provides:

> 4. After any report pursuant to this section is provided to the court, the court may order further examination and investigation of the committed individual as the court considers necessary. The court may set the matter for a hearing. At the hearing, the committed individual is entitled to be present and to the benefit of the protections afforded at the commitment proceeding. The state's attorney shall represent the state at the hearing. After the hearing, the court shall determine whether the committed individual is to be discharged or to be retained as a sexually dangerous individual in the care, custody, and control of the executive director.

[Emphasis added].

A reasonable reading of these two subsections within the same section is that the

two mandates are mutually exclusive and irreconcilable. ***State ex rel. Spaeth v. Meiers,*** 403 N.W.2d, 392, 394 (N.D. 1987).

The separation of powers doctrine "creates an implied exclusion of each branch from the exercise of the functions of the other." However, Section 25-03.3-17 makes a specific inclusion of an award of judicial powers to a member of the executive branch, i.e., executive director of the Department of Human Services.

The process to commit a sexually dangerous individual commences initially with a preliminary hearing, (Section 25-03.3-11), proceeds to a commitment hearing, (Section 25-03.3-13), and then provides an opportunity for an annual review hearing, or a petition for discharge (Section 25-03.3-18). At the initial stages, the executive director is not involved, other than to provide the evaluators. However, the Legislature has seen fit to insert him into the post-commitment proceedings under Section 25-03.3-17.

The inclusion of the phrase, ". . . in the opinion of the executive director. . ." makes this statute troublesome and confusing. On its face, it is a violation of the separation of power doctrine. It mandates that the executive director, and not the court, must decide whether "the individual is safe to be at large."

The trial court ruled that there was a presumption of constitutionality of statutes. He also ruled that by reading the statute as a whole, constitutionality is assured and the separation of powers doctrine is not implicated

P.F. believes that the Court erroneously misread the statute as a whole. The Court confuses the ability of the executive director to petition on his own initiative, which is discretionary, with the plain wording of subsection 1 of Section 25-03.3-17, which

mandates him to not release an individual until the executive director determines that he is safe to be at large. The executive director may never petition for release. Historically, the executive director has never done so. If the executive director never does petition, courts may be reluctant to release a sexually dangerous individual.

The conflict is still present. It must be resolved. The plain language of Section 25-03.3-17(1) presents a violation of the separation of powers doctrine.

The North Dakota Supreme Court has determined, in a criminal context at the time of sentencing, that while a trial court may utilize the recommendations of other professionals to advise it in making a sentencing determination, "that determination must be made by the court alone after fair and full consideration of the circumstances of the defendant." ***State v. Chapin,*** 429 N.W.2d 16, 18 (N.D. 1988). The Supreme Court found it to be an unconstitutional delegation of authority.

Section 25-03.3-17(1), N.D.Cent.Code is clearly an unconstitutional delegation of judicial authority.

2. The trial court committed reversible error when it determined that Chapter 25-03.3 does not violate the equal protection clauses of the United States and North Dakota Constitutions.

Two tests exist for determining whether a constitutional separation of powers is violated. First, no interference with judiciary is permitted in an area reserved exclusively to the judiciary and, second, undue burden or substantial interference with judiciary is

prohibited in areas of shared power. ***Village of Prentice v. Transportation Comm'n of Wisconsin,*** 365 N.W.2d 899, 123 Wis.2nd 113 (Wis.App. 1985); ***State ex rel. Straberg v. Murphy,*** 527 N.W.2d 185, 247 Neb. 358 (Neb. 1995).

An executive or administrative officer may not exercise purely judicial authority. ***City of Cedar Falls v. Flett,*** 330 N.W.2d 251 (Iowa, 1983). See also Article VI, Section 1, North Dakota State Constitution.

The statute must be declared unconstitutional in violation of the separation of powers doctrine and unconstitutional delegation of judicial authority.

There can be no doubt that a civil commitment hearing as embodied in Chapter 25-03.3 constitutes an infringement on the liberty of a committed inidivudal.

P.F. contends that the civil commitment scheme embodied in Chapter 25-03.3 is a violation of his right to an equal protection of the law.

Chapter 25-03.1, N.D.Cent.Code provides for civil commitment procedures for persons requiring treatment for mental illness or chemical dependency. Section 25-03.1-20 provides the court with alternatives for treatment other than involuntary hospitalization. Section 25-03.1-21 requires the court to:

> "review a report assessing the availability and appropriateness for the respondent of treatment programs other than hospitalization which has been prepared and submitted by the state hospital or treatment facility."

In contrast, Section 25-03.3-13, the court can only:

> "commit the respondent to the care, custody and control of

the executive director. The executive director shall place the respondent in an appropriate facility or program at which treatment is available. The treatment facility or program necessary to achieve the purposes of this chapter."

This section removes the determination of the "least restrictive treatment program or facility" from the court and gives it to the executive director, without any basis for doing so.

There is no rational basis between the scheme in Chapter 25-03.1 permitting the court to choose the "least restrictive treatment or facility" for those with mental illness, who can be just as dangerous to others as sexually dangerous individuals, and that in Chapter 25-03.3, permitting the executive director to make the choice.

To attack a statute on the grounds that it denies equal protection of the law, a party must show that the statute unconstitutionally treats members of similarly situated classes differently. U.S.C.A. Const.Amend. 14; W.S.A. Const. Art. I, §1. – ***Castellani v. Bailey,*** 578 N.W.2d 166, 218 Wis. 2d 245 (Wis. 1988).

To sustain legislation against equal protection attack:

(1) all classifications must be based upon substantial distinctions which make one class really different from another;

(2) classification adopted must be germane to purpose of law;

(3) classification must not be based upon existing circumstances only and it must not be so constituted as to preclude addition to numbers included within class;

(4) to whatever class a law may apply, it must apply equally to each member thereof; and

(5) that characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to public good, of substantially different legislation. U.S.C.A. Const.Amend. 14; W.S.A. Const.Art. I, § 1 – Id.

Long viewed as our state constitutional guarantee of equal protection, Art. I. §§21 and 22, North Dakota Constitution provide:

> "*Section 21.* No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.
>
> *Section 22.* All laws of a general nature shall have a uniform operation."

Those provisions do not prohibit legislative classifications or mandate identical treatment of different categories of persons. They do, however, subject legislative classifications to different standards of scrutiny, depending upon the right that may be infringed by the challenged classification. ***E.g., Matter of Adoption of K.A.S., supra.***

In ***Ganje v. Clerk of Burleigh County District Court,*** 429 N.W.2d 429, 433 (N.D. 1988), the Supreme Court outlined the standards of judicial scrutiny for equal protection claims under our state constitution:

"When a statute is challenged on equal protection grounds, we first locate the appropriate standard of review. We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification 'unless it is shown that the statute promotes a compelling governmental interests and that the distinctions drawn by the law are necessary to further its purpose.' ***State ex rel. Olson v. Maxwell,*** 259 N.W.2d 621, 627 (N.D. 1977). When an 'important substantive right' is involved, we apply an intermediate standard of review which requires a "close correspondence between statutory classification and legislative goals." ***Hanson v. Williams County,*** 389 N.W.2d 319, 323, 325 (N.D. 1986)[quoting ***Arneson v. Olson,*** 270 N.W.2d 125, 133 (N.D. 1978)]. When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. See ***State v. Knoefler,*** 279 N.W.2d 658, 662 (N.D. 1979))."

See ***Bismarck Public School Dist. 1 v. State,*** 511 N.W.2d 247 (N.D. 1994).

There does not appear to be "any rational basis" or "close correspondence" or

compelling governmental interest in treating mentally ill persons and sexually dangerous individuals. The statute is unconstitutional.

A secondary sub-issue of Petitioner's argument and position is as long as the Court retains sole authority to decide whether an individual is safe to be at large, why the court retains no authority over the course of treatment he receives?

Section 25-03.3-13, N.D.Cent.Code provides, in part:

> ". . . The executive director shall place the respondent in an appropriate facility or program at which treatment is available. The appropriate treatment facility or program must be the least restrictive available treatment facility or program necessary to achieve the purposes of this chapter . . ..."

P.F. sought an order from the lower court to mandate the executive director to allow him to get into the CDU unit ("chemical dependency unit").

> "His only request to Court is that the Court – I guess what his request is that he wants the Court to order that he be allowed to get into the CDU unit. There's no explanation from anybody at the State Hospital why he's been declined. I think we all agree, and Dr. Belanger agreed that that's an important component, get the alcohol dependency un der control at the same time.
>
> I think based on that, then it's up to Mr. F. To get more involved in the program and get through the phases as soon as possible. But I think it's important that he get into the CDU unit, and whatever alcohol dependency, that clearly is his major

issue which prompts him to act out sexually. So if he can reduce that liklihood, that risk is reduced, which will affect his overall risk rating. So that's his request to the Court."

(Transcript, p. 18, ll. 9-23).

The Court responded by saying,:

THE COURT: Thank you, Ms. Feland. The Court did review the reports that were submitted and has listened to the testimony today. On the matter of the CDU unit and the treatment, chemical treatment, I'm not sure that this is the appropriate hearing to make that determination. There may need to be a separate procedure or motion for that. I think all we're dealing with today is the continued commitment.

Also, the reports seem to be consistent with the position argued by the state that that's simply one component of the treatment that should be addressed with Mr. F. Dr. Belanger indicated that was probably the third factor of his concerns as far as treatment goes. So I'm not going to grant the request to order admission to the CDU unit. I simply do not think that this is the appropriate hearing for the Court to make that determination.

(Transcript p. 20, ll. 8-22).

The court failed to explain when such a hearing was available to make such a request for a particularized treatment plan. The evaluator believed that alcohol dependency treatment was essential to P.F.'s treatment plan. (Tr.p. 6, ll. 4-22). However, the only treatment component is A.A. (Tr.p. 5, ll. 7-19). How does P.F. obtain any treatment for alcohol dependency if none is available beyond A.A.? Dr. Kelly

was clear that alcohol dependency of P.F. must be addressed initially and in conjunction with a sexual offender treatment program in order to be effective for P.F. Once he completes the alcohol dependency program, he will be likely to achieve quick and sustained results from the sexual offender treatment and be closer to release. The unwillingness of the Court to order such treatment component (without any statutory restriction on his ability to do so) dooms P.F. to a longer period of commitment.

CONCLUSION

The trial court committed reversible error when it determined that Section 25-03.3-17, N.D.Cent.Code was not an unconstitutional delegation of judicial authority.

The trial court committed reversible error when it determined that Chapter 25-03.3 did not violate the equal protection clauses of the United States and North Dakota Constitutions.

The case should be reversed and remanded to District Court for further proceedings.

Dated this ___ day of August, 2007.

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CERTIFICATE OF SERVICE BY MAIL

On the 27 day of August, 2007, a copy of the foregoing Appellant's Brief and Appendix to Brief was mailed to:

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