20150287

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
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JAN 04 2016

STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff-Appellee,

vs.

Charles Lee Davis II,
Defendant-Appellant.

SUPREME COURT NO. 20150287

APPELLANT'S BRIEF

APPEAL FROM THE SEPTEMBER 25, 2015 ORDER REGARDING DISCHARGE FROM CONDITIONAL RELEASE
THE WARD COUNTY COURT IN MINOT, NORTH DAKOTA
THE HONORABLE STACY LOUSER PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

[¶ 1] I. Whether the district court usurped its authority when it ignored the plain language of the statute and failed to discharge Defendant where both experts opined there was not a substantial risk he will commit a crime?

STATEMENT OF THE CASE

[¶ 2] Defendant-Appellant Charles Lee Davis II appeals from the September 25, 2015 Order Regarding Discharge from Conditional Release. (A-46)[1] Defendant seeks reversal and complete discharge from the care and custody of the Department of Human Services and North Dakota State Hospital on the grounds that both expert witnesses opined that there was not a substantial risk that he will commit, as a result of mental illness or defect, a criminal act.

[¶ 3] On April 21, 2011, the State filed an Information charging Defendant with Murder, a Class AA Felony, in violation of N.D.C.C. § 12.1-16-01(1)(a)(b) and Theft of a Motor Vehicle, a Class C Felony, in violation of N.D.C.C. § 12.1-23-02. (A-9) On October 19, 2011, Defendant filed the Notice of Defense of Lack of Criminal Responsibility. (Notice, docket sheet No. 48.)

[¶ 4] On March 21, 2012, Defendant entered unresisted pleas of not guilty by lack of criminal responsibility to Murder and Theft of a Motor Vehicle. Judge William McLees ordered

1 Appendix

an Order for Evaluation for Dangerousness. (A-11) On August 20, 2012, pursuant to N.D.C.C. § 12.1-04.1-20(1), Judge McLees entered a Commitment Order. Defendant was ordered committed to the North Dakota State Hospital "with the express understanding being the period of commitment pursuant to this Order may be for the rest of Davis's natural life." (Order, docket sheet No. 109, p. 2; A-16)

[¶ 5] On September 25, 2013, at the annual review hearing, on the record, the parties stipulated that Defendant be conditionally released. Pursuant to N.D.C.C. § 12.1-04.1-24(3)(c), Judge McLees entered the Order for Conditional Release, ordering Defendant conditionally released from the North Dakota State Hospital. (A-18)

[¶ 6] On March 18, 2015, Defendant filed and served his Motion for Discharge. Defendant moved "the court for an Order, discharging him from the care and custody of the Department of Human Service, discharging him from the North Dakota State Hospital, and transforming the conditional release from the North Dakota State Hospital into a full release from further constraint on the grounds that 'there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act.'" (Motion, docket sheet No. 156)

[¶ 7] At the August 27, 2015, Dr. Krislea Wegner testified for Defendant. Dr. Lynne Sullivan testified on behalf of the State. On September 25, 2015, Judge Stacy Louser

entered her Order Regarding Discharge from Conditional Release, denying Defendant's Motion for Discharge. (A-23) Judge Louser reasoned the legislature did intend the word, "shall" be mandatory under N.D.C.C. § 12.1-04.1-25 (5)(a). "Because Dr. Wegner and Dr. Sullivan each testified that there is not a substantial risk that Davis will commit a criminal act as a result of his mental illness or defect, Davis argues that the court is mandated to discharge him from civil commitment. ..." "[I]t is this Court's belief that the legislative intent of N.D.C.C. § 12.1-04.1-25(5) was that all subdivisions of any statute be read and interpreted in the context of one another, rather than via piecemeal analysis. Here, because N.D.C.C. § 12.1-04.1-25(5) is not limited to solely subdivision (a), it is this Court's belief the legislative intent of N.D.C.C. § 12.1-04.1-25(5)(a)-(c) was to provide the Court with further alternatives when assessing whether to continue, modify, or terminate a conditional release." (Memorandum, docket No. 175, ¶ 32 to ¶ 33; A-40) Judge Louser chose subsection (b) over subsection (a) to deny the motion. (A-24 to A-25)

[¶ 8] On September 28, 2015, Defendant filed his Notice of Appeal. (A-46)

STATEMENT OF THE FACTS

[¶ 9] The facts relevant to the issue on appeal are not in dispute. Defendant continues to have the mental illness,

paranoid schizophrenia. Diagnostic impression is "[s]chizoprenia, paranoid type, single episode, in remission." (Exhibit, docket No. 168, p. 8)

[¶ 10] At the hearing, Dr. Wegner testified that Defendant is doing very well. He has a full-time job at Buffalo City Diesel. He started in June 2015. Previously, he worked full-time at Crossroads Inc. for 1.5 years. (T 11[2], Exhibit, docket No. 170, p. 2) He currently lives with his wife, Tammy, and his two sons, H. and D., in their home in Jamestown, North Dakota. (T 13, Exhibit, docket No. 168, p. 1)

[¶ 11] Defendant has no travel restrictions inside the State of North Dakota. During the last year, he visited Texas on four separate occasions with no supervision whatsoever. On November 26-30, 2014, he went to Texas for Thanksgiving. On February 5-8, 2015, he went to Texas. On April 9-12, 2015, he went to Texas. On June 3, 2015 until June 14, 2015, he went to Texas to attend and celebrate H.'s high school graduation. (T 14; Exhibit, docket No. 168, p. 2) On these visits, Defendant was not required to wear a GPS monitor. He was not required to call and check in with the North Dakota State Hospital or Department of Human Services. In fact, neither the North Dakota State Hospital or Department of Human Services called or checked on him once during these four Texas vacations. They deem he is not a safety risk. (T 14-15) The North Dakota Department

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of Transportation corroborated this assessment. For the second straight year, the Department of Transportation gave Defendant a commercial drivers license. (Exhibit, docket No. 168, p. 2)

[¶ 12] Dr. Wegner opined "[t]here appear to be no additional goals to achieve to minimize risk and concern related to his safety and well being." (Exhibit, docket No. 168, p. 9) Dr. Wegner opined Defendant should be discharged. Dr. Wegner opined that based on Defendant's mental illness, there is not a substantial risk he will commit a crime. (T 11) Dr. Wegner further opined if Defendant is discharged, based on his mental illness, there is not a substantial risk he would commit a crime. (T 11)

[¶ 13] Dr. Wegner testified that Defendant's interaction and supervision with the Executive Director and North Dakota State Hospital is minimal. (T 13) He is also getting duplicative services from the Veterans Affairs Hospital. He sees both Dr. Simpao and Dr. Gulkin at the Veterans Affairs Hospital. (T 16-17) "Their records document a very similar presentation as South Central's. That they view him as in remission and stabilized, low risk, high functioning, and that they are willing to follow his medical and psychological needs, psychiatric needs, if there is a discharge." (T 16) Upon his discharge, Dr. Wegner testified Defendant would maintain his services with the Veterans Affairs Hospital. (T 16-17)

[¶ 14] He is currently taking his prescribed medications and has complied with all his treatments and appointments. Dr. Wegner has interviewed him four times in the last year. He has had no psychiatric symptoms since the incident in 2011. Dr. Wegner opined it is unlikely said symptoms would return. He is highly motivated to maintain his treatment and lifestyle to ensure that no psychiatric problems resurface.

[¶ 15] Dr. Wegner testified that Defendant has insight into his mental illness and does not have any chemical dependency issues. Dr. Wegner testified, per the science, these are important factors in medication adherence. (T 12-16) Dr. Wegner testified the risk that Defendant would stop taking his medications, upon his discharge, is low. (T 17) Defendant has said he needs to take his medications for his and his family's well-being. (T 16) According to the science, a stable family environment helps ensure medication compliance. (T 12)

[¶ 16] Dr. Sullivan testified Defendant "is doing extremely well." "Unusually well as Doctor Wegner pointed out. His prognosis is actually very good, given the compliance that he has demonstrated with all requirements. I believe that the treatment, therapy has decreased in frequency as appropriate." (T 28) Defendant has been self-administering medications for several months. Dr. Sullivan indicated that Defendant does not pose a risk to society: "I don't believe I explicitly stated that there was a risk." (T 29)

[¶ 17] Dr. Sullivan testified that currently, based on his mental illness, there is not a substantial risk he will commit a crime. (T 31) Dr. Sullivan further opined if Defendant was discharged, based on his mental illness, there is not a substantial risk Defendant will commit a crime. (T 31) Dr. Sullivan recommended Defendant be monitored solely by the Veterans Affairs Hospital. (T 29)

ARGUMENT

[¶ 18] I. The district court usurped its authority when it ignored the plain language of the statute and failed to discharge Defendant where both experts opined there was not a substantial risk he will commit a crime.

[¶ 19] N.D.C.C. § 12.1-04.1-25(5) states:

"Upon application by an individual conditionally released, by the director or superintendent of the treatment facility or person responsible for supervision of an individual pursuant to an order of conditional release, or by the prosecuting attorney, the court shall determine whether to continue, modify, or terminate the order. The court shall consider and dispose of an application promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:

a. If the court finds that the individual is not mentally ill or defective or that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order that the individual be discharged from further constraint under this chapter.

b. If the court finds that the individual is

mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it may modify the conditions of release as appropriate for the protection of society.

c. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is no longer a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual, as a result of mental illness or defect, will commit a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical psychiatric, or psychological treatment recommended by the treatment facility." [emphasis added.]

There are no North Dakota State Supreme Court cases involving N.D.C.C. § 12.1-04.1-25.

[¶ 20] However, statutory interpretation is a question of law. Ralston v. Ralston, 2003 ND 160, ¶ 5, 670 N.W.2d 334. The "primary objective is to ascertain legislative intent, which must be sought initially from the language of the statute." Id. at ¶ 5. In interpreting a statute, words are to be understood in their ordinary meaning. N.D.C.C. § 1-02-02; Id. at ¶ 5. "When a statute's language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, as legislative intent is presumed clear from the face of the statute." Kroschel v. Levi, 2015 ND 185, ¶ 9, 866 N.W.2d 109; N.D.C.C. § 1-02-05. "Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence." State v. Kuruc, 2014 ND 95, ¶ 32, 846 N.W.2d 314.

[¶ 21] In a statute, the word "shall" creates a mandatory duty. City of Devils Lake v. Corrigan, 1999 ND 16, ¶ 12, 589 N.W.2d 579; State v. Glaser, 2015 ND 31, ¶ 18, 858 N.W.2d 920. In Glaser, this Court noted the difference between "shall" and "may" in a statute. "By using the word 'may,' rather than 'shall,' the statute does not require the court to act; it simply confers discretion on the court." Id. at ¶ 19.

[¶ 22] Here, the plain language of the statute clearly indicates if Defendant proves by a preponderance of the evidence that he is no longer a substantial risk to commit a crime, the court is mandated to discharge Defendant. The district court does not have discretion because the statute states "shall", not "may." The evidence is unrefuted. Both expert witnesses opined that there does not exist a substantial risk that Defendant will commit a crime due to his mental illness. (T 11,31) Both expert witnesses further opined that if Defendant is discharged, there does not exist a substantial risk that Defendant will commit a crime. (T 11,31) These expert opinions were not mere conclusionary statements, but based on all the evidence!

[¶ 23] Judge Louser erroneously rationalized the legislature did not intend to use "shall" in subsection (a) because "the legislative intent of N.D.C.C. § 12.1-04.1-25(5) was that all subdivisions of any statute be read and interpreted in the context of one another, rather than via piecemeal analysis." (Memorandum, docket No. 175, ¶ 33; A-40) This is clearly erroneous because read, as a whole, the statute clearly mandates discharge. The plain language of the statute goes from more specific criteria to less specific criteria. Under subsection (a), if there is not a substantial risk that Defendant will commit any crime, then he shall be discharged. If there is a substantial risk that Defendant will commit a crime, but not a crime involving violence or property damage,

then subsection (b) applies. If there is a substantial risk Defendant will commit a crime of violence or property damage, then subsection (c) applies. Based on the plain language of the statute, there is no other way to interpret the statute!

[¶ 24] Judge Louser thwarted clear legislative intent because under her interpretation subsection (a) is meaningless. Under her interpretation, the district judge has unfettered discretion to determine what is best for society and Defendant: "Well it is a rather extreme remedy that's being requested by you, Mr. Edinger. And I do believe the statue [sic] does also state that the Court has the authority to modify the conditions as appropriate for the protection of society." (T 34) The plain language of the statute clearly indicates the legislature did not intend district judges to have unfettered discretion. The legislature knew the difference between "shall" and "may" when they created the statute!

[¶ 25] Judge Louser mischaracterized both experts' testimony to attempt to fit it under subsection (b):

> "Based on the testimony of Dr. Wegner and Dr. Sullivan and pursuant to N.D.C.C. § 12.1-04.1-25(5)(a), there is not a substantial risk that Davis will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage at the present time. However, the Court also finds that based on Dr.

> Wenger [sic] and Dr. Sullivan's reports, the risk of potential mental health episodes increases if medications are stopped." (Order, docket No. 176, ¶ 3; A-24)

This is contrary to all the testimony. Both experts clearly testified that there is not a substantial risk that Defendant will not commit any criminal act. The experts clearly did not limit themselves to a specific crime. (T 11,31)

[¶ 26] Here, Judge Louser repeatedly usurped legislative intent by ignoring and modifying the plain language of the statute. To combat all the evidence presented at the hearing, Judge Louser impermissibly modified the statute by imposing a proof beyond a reasonable doubt standard on Defendant and eliminated "substantial risk" from statute and replace it with "risk." Judge Louser reasoned that because "there is a potential risk of deterioration should Davis chose to stop taking his medications" she can ignore the plain language of the statute. (Memorandum, docket No. 175, ¶ 38; A-42)

[¶ 27] Moreover, Judge Louser created a murder exception for the statute: "In light of the heinous nature seemingly unprovoked and random event that occurred on March 12, 2011, this Court cannot, in good faith, defer to Davis the discretion to decide whether or not to take his medications, as the risk to Davis himself and society at large is simply too great were Davis to stop taking his medications."

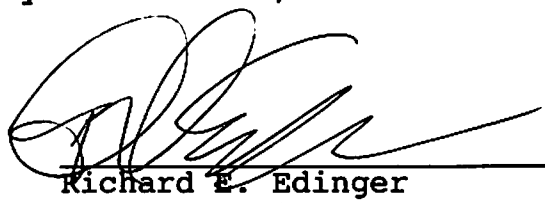
(Memorandum, docket No. 175, ¶ 39; A-42) By definition, all murder cases caused by mental illness are heinous by nature and unprovoked. If the legislature had intended murder be exempted from the statute, they would have written it into the statute. Judge Louser justified ignoring the plain language of the statute because "the Court does not believe that requiring Davis to continue with medical services is unduly onerous and that mandating Davis to continue with his current medical regimen." (Memorandum, docket No. 175, ¶ 44; A-43)

[¶ 28] The plain language of the statute and the evidence is clear. Judge Louser may not like the evidence presented at the hearing. Judge Louser may not like the application of N.D.C.C. § 12.1-04.1-25(5) to the facts. However, as a district judge, she is obligated to follow the clear and unambiguous legislative mandate. Judge Louser usurped her authority when she failed to discharge Defendant.

CONCLUSION

[¶ 29] WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the September 25, 2015 Order Regarding Discharge from Conditional Release and order a complete and full discharge for Appellant from the Executive Director of Human Services and the North Dakota State Hospital.

Dated this 31st day of December, 2015.



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STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff=Appellee, vs. Charles Lee Davis, II, Defendant-Appellant.	)	SUPREME COURT NO. 20150287

CERTIFICATE OF SERVICE

Richard E. Edinger, hereby certifies and swears that:

[¶ 1] On January 4, 2016, I filed Appellant's Brief and Appendix and copies thereof, and I served a copy of Appellant's Brief and Appendix onto Appellee.

[¶ 2] I put a true and correct copy of the aforementioned documents and deposited it with a third-party commercial carrier, Federal Express, in Fargo, North Dakota, and said documents were Fedexed to Ms. Rozanna Larson, State's Attorney, Ward County Courthouse, 315 3rd Street SE, Minot, ND 58701.

Dated this 4th day of January, 2016.

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CERTIFICATE OF SERVICE

Richard E. Edinger, hereby certifies and swears that:

[¶ 1] On January 7, 2016, I filed the redacted page four of Appellant's Brief and I served a copy thereof onto Appellee.

[¶ 2] I put a true and correct copy of the aforementioned document and deposited it in the United States Mail to Ms. Rozanna Larson, State's Attorney, P.O. Box 5005, Minot, ND 58702-5005.

Dated this 7th day of January, 2016.

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