20160213

THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20160213

In the Matter of Darl John Hehn	)	
	)	
Jonathan Byers, Special Assistant State's Attorney,	)	
	)	FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT
Petitioner and Appellee	)	
v.	)	OCT 06 2016
	)	
Darl John Hehn,	)	
	)	STATE OF NORTH DAKOTA
Respondent and Appellant.	)	

APPEAL FROM ANNUAL REVIEW AND ORDER
DENYING DISCHARGE FOR YEAR 2016

RICHLAND COUNTY DISTRICT COURT

THE HONORABLE DANIEL D. NARUM, PRESIDING

BRIEF OF APPELLEE

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[¶ 3] STATEMENT OF FACTS AND PROCEEDINGS

[¶ 4] Darl John Hehn (Hehn) was originally committed as a sexually dangerous individual in November of 2006. Hehn appealed that decision to the North Dakota Supreme Court, which affirmed his commitment. Matter of Hehn, 2008 ND 36, 745 N.W.2d 631. The following history appears in that opinion:

> In April 1997, Hehn pled guilty to two counts of gross sexual imposition and one count of terrorizing. The charges and convictions were based on an incident involving Hehn's 17-year-old former girlfriend. In May 1996, Hehn took his former girlfriend from her home at gunpoint, sexually assaulted her, and then forced her to have sex with him. Hehn was sentenced to 16 years in prison, with 8 years suspended, for the two counts of gross sexual imposition ("GSI") and to an additional five years, to run concurrently with the GSI sentences, for his terrorizing conviction.
>
> In June 2003, Hehn was released from prison on supervised probation. He returned to Wahpeton for the probationary period. Heidi Arnholt served as his probation officer. During the course of his probation in Wahpeton, eleven reports regarding Hehn's conduct were filed with Arnholt or the area police department. Several complaints alleged Hehn treated an employee at the public library poorly. Two other reports alleged Hehn walked or drove behind pre-adolescent and teenage girls. One report from the school principal alleged that Hehn's car was seen parked near the high school. Several other complaints came from witnesses who were concerned after they saw Hehn walking through their backyards. Another report provided that Hehn sent a flirtatious email to a girl, who was at or just under eighteen years old, asking her to marry him. Another complaint came from a "youthful looking" twenty-year-old employee at West Acres Mall, who said Hehn came into the store and gave her a sexually inappropriate letter. Several lay witnesses and Arnholt testified about the community complaints.
>
> Hehn remained under Arnholt's supervision until February 2004, when he was arrested for violating conditions of his probation. Hehn's probation was revoked in June 2004 when he admitted to violating conditions of probation; he was sentenced to two years with the Department of Corrections. Hehn was scheduled for discharge from the North Dakota State Penitentiary on February 12, 2006, when the petition for commitment was filed.

[¶ 5] The North Dakota Supreme Court affirmed the order committing Hehn as a sexually dangerous individual. After his commitment to the State Hospital, Hehn was convicted of Menacing and Criminal Mischief, and placed in the custody of the Department of Corrections and Rehabilitation in 2007. He returned to the State Hospital on November 25, 2009, to continue his SDI treatment. Hehn petitioned for release in 2010, the trial court denied the petition, and the Supreme Court eventually affirmed the decision finding Hehn was still a sexually dangerous individual. Matter of Hehn, 2012 ND 191, 821 N.W.2d 385.

[¶ 6] By the time of his 2011 annual review, Hehn had been demoted to Skills I, a pretreatment group, and Hehn's therapists did not believe he was making any progress in treatment. Both experts in the 2011 review, Dr. Lisota for the State and Dr. Benson as the independent expert, agreed that Darl Hehn met all criteria to remain committed as a sexually dangerous individual. Hehn appealed, and the order denying his discharge was affirmed. Matter of Hehn, 2013 ND 191, 838 N.W.2d 469.

[¶ 7] Rather than invest himself in treatment, Hehn spent his time subsequent to that appeal fighting the staff and "sticking up for his patient's rights," as he calls it. Hehn requested an annual review hearing in 2014, and he was found to still be a sexually dangerous individual. He appealed, and the order denying discharge was once again affirmed. Matter of Hehn, 2015 ND 218, 868 N.W.2d 551.

[¶ 8] After a 2015 request for an annual review, a discharge hearing was held on March 18, 2016, and April 8, 2016. As in the previous proceedings, Hehn was found to be a sexually dangerous individual, and this appeal followed.

[¶ 9] ARGUMENT

[¶ 10] I. STANDARD OF REVIEW

[¶ 11] The North Dakota Supreme Court reviews civil commitments of sexually dangerous individuals under a modified clearly erroneous standard in which the Court will affirm a district court's order "unless it is induced by an erroneous view of the law or we are firmly convinced [the order] is not supported by clear and convincing evidence." Matter of Vantreece, 2009 ND 152, ¶ 4, 771 N.W.2d 585 (quoting Matter of G.R.H., 2008 ND 222, ¶ 7, 758 N.W.2d 719).

[¶ 12] At a discharge hearing, the State has the burden of proving by clear and convincing evidence the committed individual remains a sexually dangerous individual. Matter of Midgett, 2009 ND 106, ¶ 6, 766 N.W.2d 717. N.D.C.C. § 25-03.3-01(8) defines a "sexually dangerous individual" to mean "an individual who is shown to have 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." See Matter of Vantreece, 2009 ND 152, ¶ 6, 771 N.W.2d 585; Matter of G.R.H., 2006 ND 56, ¶ 6, 711 N.W.2d 587.

[¶ 13] II. HEHN HAS NOT SHOWN THAT THE STATE HOSPITAL WITHHELD TREATMENT FROM HIM OR THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED.

[¶ 14] A. There is no record that the State Hospital withheld treatment from Hehn.

[¶ 15] Hehn claims, "Since Hehn's commitment in 2006, NDSH has denied him treatment in contravention to the statutorily mandated treatment, as set forth in N.D.C.C. 25-03.3-13, and in violation of his right to substantive due process and freedom from cruel and unusual punishment." (Hehn appellant's brief ¶14). The evidence is contrary to Hehn's claim and shows that the treatment is available to him, yet he refuses to follow even the basic rules that allow the State Hospital to maintain discipline. Because of his behavioral problems, Hehn keeps getting demoted back to the lowest stage, and then has to do homework assignments he has already completed. His frustration was eventually his own undoing. Hehn intentionally violated the law, attempting to go back to prison:

> MR. BYERS: When you were in this mind set where you decided you were going to try to get sent back to prison—
>
> MR. HEHN: Yes.
>
> MR. BYERS: --you had to understand that the conduct you were going to have to do to get back to prison was going to ruin your treatment progress. Right?
>
> MR. HEHN: Yes, I did.
>
> MR. BYERS: So you made that conscious decision?
>
> MR. HEHN: Well, I didn't think they were going to keep me in the damn Core for 9 months though, either. I thought I was going to be able to go right to county jail like – I mean, that's normally what happens.

MR. BYERS: But even if you weren't in Core you were going to be in Skills I and they probably – you had to think they're not going to jump me up to Secure Two right away and let you be—

MR. HEHN: No. I was on Skills I at that time. I figured I'm going to break the law. I'm tired of this shit. I'm going back to prison. I'll just sit there. It would be better.

(August 14, 2014, transcript, p. 161, lines 7-25).

[¶ 16] During the most recent discharge hearing, Hehn admitted that his own behavior was responsible for him getting disciplined:

MR. BYERS: Mr. Hehn, would you agree that your behavior had showed an increase in problems in February and March?

MR. HEHN: I would say some of it was my behavior.

(March 18th, 2016, transcript, p. 138, lines 9-11).

[¶ 17] The trial court had expressed some concern in the past about treatment for Hehn's borderline personality disorder. Dr. Mehring addressed that issue in her testimony:

MR. BYERS: I want you to address for the court, the judge had raised some concern in the last annual review some concern that – about making sure that he has some treatment for his borderline personality disorder. Can you describe what he's been receiving in that regard? Or what's been offer to him in that regard?

DR. MEHRING: Well, there's you know, DBT is one of the treatments that is out there for borderline personality disorder, but it's based on cognitive behavior therapy and it's about skills and that is what they do at the State Hospital. He does a lot of cognitive behavioral type work in his cog classes. He also – in the notes it was noted that they are working on healthy lifestyles, they are working on wise mind, which is part of the DBT mindfulness thing. I think he will get more when he moves up to the next stage, but at this point he hasn't moved up. Part of that is he hasn't met the points to move up because of his behavioral stuff. Really needs to have his behaviors in line before he moves up to more intensive treatment....The other reason he hasn't move up is because he had said he didn't want to move up. He was worried he wasn't ready to move up

due to his mother's health and because he also disagrees with some of the treatment that's going on in the next level....

(March 18th, 2016, transcript, p. 29, lines 1-24).

MR. BYERS: Okay. Has there been anything offered to Darl Hehn that might help with his borderline personality disorder that he's chosen not to avail himself of?

DR. MEHRING: Yes. They had started a problem solving group and it was a voluntary group. There was fliers put up and other residents did attend this group and Mr. Hehn just did not sign up for the group.

(March 18th, 2016, transcript, p. 30, lines 7-13).

[¶ 18] Rather than the State Hospital withholding treatment, Hehn's own conduct and decisions resulted in him not advancing in treatment. The trial court did not abuse its discretion in rejecting this claim. See In the Interest of D.W., 2016 ND 156, ¶19, 883 N.W.2d 444. (Section 25-03.3-13, N.D.C.C., states "[t]he executive director may not be required to create a less restrictive treatment facility or treatment program specifically for the respondent or committed individual." Because the statute states D.W. is not entitled to a specialized treatment program, the district court order finding D.W. already has access to the most appropriate and least restrictive care was not clear error.)

[¶ 19] B. Hehn has not shown a constitutional violation.

[¶ 20] When given an opportunity to make an opening statement, Hehn's counsel first reserved it and then gave a two paragraph opening statement which did not mention any constitutional claims. (March 18, 2016, transcript pp. 23 and 83). At Hehn's request, closing arguments were to be submitted in writing. It was in the closing argument, submitted after the discharge hearing, that Hehn first made any constitutional claims.

[¶ 21] The applicable standard is, in part, under Youngberg v. Romeo, 457 U.S. 307 (1982). Under Youngberg, a civilly committed individual has constitutionally protected interests under the due process clause of the Fourteenth Amendment to reasonably safe conditions of confinement, including "adequate food, shelter, clothing, and medical care" and "reasonable safety." Id. at 324. "In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness." Id. And "'[b]efore official conduct or inaction rises to the level of a substantive due process violation[,] it must be so egregious or outrageous that it is conscience-shocking.'" Beck v. Wilson, 377 F.3d 884, 890 (8th Cir. 2004). State Hospital decisions regarding Hehn's care are presumptively correct.

[¶ 22] Commitment of a sexually dangerous individual under N.D.C.C. ch. 25-03.3 is civil in nature, it is not punitive. See In re G.R.H., 2011 ND 21, 793 N.W.2d 460. Hehn's commitment as a sexually dangerous individual is not punishment and the cruel and unusual punishments clauses of the Eighth Amendment or Article I, Section 11 of the North Dakota State Constitution do not apply to his civil commitment. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671–672, n. 40, 97 S.Ct. 1401, 1412-1413, n. 40, 51 L.Ed.2d 711 (1977); see Bell v. Wolfish, 441 U.S. 520, 535, n. 16, 99

S.Ct. 1861, 1872, n. 16, 60 L.Ed.2d 447 (1979). "Because there had been no formal adjudication of guilt against Kivlin at the time he required medical care, the Eighth Amendment has no application." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983).

[¶ 23] III. HEHN HAS NOT SHOWN THE TRIAL COURT COMMITTED OBVIOUS ERROR BY ADMITTING THE MEHRING REPORT.

[¶ 24] In the spring of 2016, when Hehn's discharge hearing was pending, the court and parties were advised that Dr. Lynn Sullivan was on extended medical leave and would not be available until probably June. At one of the pretrial conferences, the court addressed the issue and asked whether the parties preferred to continue the discharge hearing so that Dr. Sullivan could be present to answer questions about her report, which had been filed December 15, 2015. Hehn's counsel indicated that his client's mother was gravely ill, and they did not want another continuance.

[¶ 25] The State Hospital then had Dr. Deon Mehring review Dr. Sullivan's report and do an addendum report of her own, which was filed with the court. When the discharge hearing began on March 18, 2016, Hehn objected to the admission of Dr. Sullivan's report because she was not there to testify. (March 18, 2016 transcript p. 13-14). When the court indicated a willingness to exclude Dr. Sullivan's report, Hehn then moved to strike any reference to Dr. Sullivan's report in Dr. Mehring's report. The Petitioner pointed out that Dr. Ertelt's report indicated he had relied on the reports of Dr. Reidel and Dr. Sullivan when he prepared his report. (March 18 2016 transcript p. 19 lines 1-9).

[¶ 26] The Petitioner finally pointed out that the remedy for all this was another continuance so that Dr. Sullivan could be present to testify, and Hehn's counsel had already said that he didn't want that. The court agreed and said its understanding was the issue had been dealt with at the pretrial conference. (March 18 transcript p. 29, lines 12-18).

[¶ 27] Hehn elected to have his cake and eat it too. He decided to move ahead with no continuance, but keep the right to complain in his back pocket. When Dr. Mehring's report was offered into evidence, Hehn indicated no objection. (March 18, 2016 transcript, p. 21 lines 11-15). The initiative is placed on the party, not the judge, to object to offered evidence. City of Fargo v. Erickson, 1999 ND 145, ¶19, 598 N.W.2d 787 (Sandstrom, J., concurring specially). A party's failure to object, therefore, is a waiver upon appeal of any ground of complaint against its admission. State v. Lee, 2004 ND 176, ¶10, 687 N.W.2d 237; In the Interest of Jeremy Tim Johnson, 2013 ND 146, ¶10, 835 N.W.2d 806 (Johnson's failure to object to Dr. Krance's testimony regarding the peer review of the SDI evaluation constitutes a waiver, and Johnson cannot now challenge the admission of evidence on appeal.)

[¶ 28] IV. HEHN HAS NOT SHOWN THE TRIAL COURT'S FINDING THAT HEHN IS STILL A SEXUALLY DANGEROUS INDIVIDUAL WAS OBVIOUS ERROR.

[¶ 29] Hehn's brief indicates the District Court supported its conclusion that Hehn is likely to engage in further acts of sexually predatory conduct by finding Hehn 1) lacks progress in treatment; 2) has a high psychopathy score; 3) has manifested his borderline personality disorder in extreme ways in that Hehn has

poor judgment, problems following rules, and a fixation of a belief system; and 4) that Hehn has been in jail or in detention for most of the last year for menacing and disorderly conduct. However, Hehn argues the District Court misapplied the law because it did not even reference sexual behavior of any kind. (Hehn brief, ¶27.)

[¶ 30] Hehn's argument has been rejected by the North Dakota Supreme Court on previous occasions. "[T]he phrase 'likely to engage in further acts of sexually predatory conduct' as used in N.D.C.C. § 25-03.3-13 means that the respondent's propensity towards sexual violence is of such a degree as to pose a threat to others." Interest of M.B.K., 2002 ND 25, ¶ 18, 639 N.W.2d 473. To determine whether the element is met, experts and courts may "use the fullness of their education, experience and resources available to them in order to determine if an individual poses a threat to society." Matter of Voisine, 2010 ND 17, ¶ 14, 777 N.W.2d 908 (quoting M.B.K., at ¶ 18). "[A]ll relevant conduct should be considered." Voisine, at ¶ 14.

[¶ 31] Hehn asserts that because Dr. Ertelt disagreed with Dr. Mehring, that means that the State failed in its burden to prove the prong by clear and convincing evidence. However, in Matter of J.T.N., 2011 ND 231, ¶ 8, 807 N.W.2d 570, the trial court found the State's expert more credible, even though the respondent hired five independent experts to conduct evaluations and testify for him. On appeal, the North Dakota Supreme Court reiterated that it does not reweigh expert testimony:

> The district court gave more weight to Dr. Lisota's testimony and report than it gave to the testimony and reports of J.T.N.'s experts.

> The district court made detailed findings, including credibility determinations and references to the evidence relied on. See Interest of L.D.M., 2011 ND 25, ¶ 6, 793 N.W.2d 778. We conclude the district court's finding that J.T.N. was likely to engage in further acts of sexually predatory conduct was not clearly erroneous because we are not firmly convinced the finding was not supported by clear and convincing evidence.
>
> Id. at ¶ 12.

[¶ 32] This Court has said that the district court is the best credibility evaluator in cases of conflicting testimony, and the Court will not second-guess the district court's credibility determinations. Matter of A.M., 2009 ND 104, ¶ 10, 766 N.W.2d 437. Claims that a district court improperly relied on the opinion of one expert instead of another challenge the weight the evidence was assigned, not the sufficiency of the evidence. Matter of Hehn, 2008 ND 36, ¶ 22, 745 N.W.2d 631. Because evaluation of credibility where evidence is conflicting is solely a trial court function, the North Dakota Supreme Court will not reweigh expert testimony. Matter of J.T.N., supra. "We consistently have declined to 'second-guess the credibility determinations made by the trial court' in sexually dangerous individual proceedings." Id., citing Hehn at ¶ 23; Matter of Wolff, 2011 ND 76, ¶¶ 5, 13-14, 796 N.W.2d 644; Interest of G.L.D., 2011 ND 52, ¶¶ 5-10, 795 N.W.2d 346; Matter of A.M., 2010 ND 163, ¶¶ 19-21, 787 N.W.2d 752; Matter of Hanenberg, 2010 ND 08, ¶¶ 17-18, 777 N.W.2d 62; Matter of T.O., 2009 ND 209, ¶¶ 8-11, 776 N.W.2d 47; Matter of Vantreece, supra, at ¶¶ 4, 18; Matter of A.M., 2009 ND 104, ¶¶ 10, 20, 766 N.W.2d 437; Matter of R.A.S., 2009 ND 101, ¶ 10, 766 N.W.2d 712; Matter of G.R.H., 2008 ND 222, ¶¶ 7, 11, 758 N.W.2d 719; Matter of M.D., 2008 ND 208, ¶¶ 7, 11, 757 N.W.2d

559. "We have further explained that a choice between two permissible views of the weight of the evidence is not clearly erroneous." Wolff at ¶ 14.

[¶ 33] Hehn's claim that the court improperly relied on Dr. Mehring's testimony (which accords with former testimony by Drs. Lisota and Krance) instead of Dr. Ertelt's testimony is a challenge to the weight of the evidence, which the Court will not reweigh, and cannot rise to the standard of being clearly erroneous.

[¶ 34] 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 (2002)). Hehn's discussion of the Kansas v. Crane factor amounts to nothing more than a further indictment of the State Hospital, an invitation for the Supreme Court to re-weigh the testimony of the experts, and an erroneous reading of North Dakota Supreme Court precedent.

[¶ 35] In Matter of Mangelsen, 2014 ND 31, 843 N.W.2d 8, Mangelsen contended there must be evidence specifically showing a continued difficulty in controlling sexual behavior to warrant be commitment under N.D.C.C. ch. 25-03.3. The North Dakota Supreme Court disagreed, stating, "Neither Kansas v. Crane nor our case law, however, require the conduct evidencing the individual's serious difficulty in controlling his behavior to be sexual in nature." Id. at ¶ 12.

[¶ 36] Almost all the experts that have testified in Hehn's cases have indicated his borderline personality disorder is responsible for Hehn acting the way he does. Although his behaviors did get better for most of the review period, He still

did receive a number of behavioral write-ups in the two months preceding the review period, believes he knows more than his treatment providers, and has not progressed in treatment.

[¶ 37] CONCLUSION

[¶ 38] Hehn's lack of progress in treatment is due to his own conduct, in large part intentional. Although he did exhibit a greater degree of control this review period than in the past, Dr. Mehring and then the District Court found him to still be a sexually dangerous individual who has serious difficulty controlling his behavior. Those findings are not clearly erroneous. The order denying the petition for discharge should be affirmed.

Dated this 6th day of October, 2016.

RESPECTFULLY SUBMITTED:

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THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20160213

In the Matter of Darl John Hehn Ronald W. McBeth, Richland County State's Attorney, Petitioner and Appellee v. Darl John Hehn, Respondent and Appellant.	)	AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Vanessa K. Kroshus states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 6th day of October, 2016, I served the attached BRIEF OF APPELLEE upon Jonathan Green, by placing a true and correct copy thereof in an envelope addressed as follows:

MR JONATHAN GREEN
ATTORNEY AT LAW
522 DAKOTA AVE STE 1
WAHPETON ND 58075-4415

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Vanessa K. Kroshus

Vanessa K. Kroshus

Subscribed and sworn to before me
this 6th day of October, 2016.

Peggy A. Brunelle
NOTARY PUBLIC

PEGGY A. BRUNELLE
Notary Public
State of North Dakota
My Commission Expires Dec. 22, 2017

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. ~~20140430~~ 20160213

In the Matter of Darl John Hehn Jonathan Byers, Special Assistant State's Attorney, Petitioner and Appellee v. Darl John Hehn, Respondent and Appellant.	)	AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Vanessa K. Kroshus states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 11th day of October, 2016, I served the attached Cover for Brief of Appellee upon Jonathan Green, by placing a true and correct copy thereof in an envelope addressed as follows:

MR JONATHAN GREEN
ATTORNEY AT LAW
522 DAKOTA AVE STE 1
WAHPETON ND 58075-4415

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Vanessa K. Kroshus

Vanessa K. Kroshus

Subscribed and sworn to before me
this 11th day of October, 2016

NOTARY PUBLIC

ALICE M. JOHNSON
Notary Public
State of North Dakota
My Commission Expires April 10, 2019