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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 226

In the Matter of Darl John Hehn

Megan Kummer, State's Attorney — Petitioner and Appellee

v.

Darl John Hehn, — Respondent and Appellant

No. 20190353

Appeal from the District Court of Richland County, Southeast Judicial District, the Honorable Daniel D. Narum, Judge.

REMANDED WITH INSTRUCTIONS.

Opinion of the Court by McEvers, Justice.

Megan E. Kummer, State's Attorney, Wahpeton, ND, for petitioner and appellee; submitted on brief.

Jonathan L. Green, Wahpeton, ND, for respondent and appellant; submitted on brief.

Matter of Hehn
No. 20190353

McEvers, Justice.

[¶1] Darl Hehn appeals from a district court order denying his petition for discharge from civil commitment as a sexually dangerous individual. Because the district court failed to make sufficient findings, we remand while retaining jurisdiction under N.D.R.App.P. 35(a)(3) with instructions that the court make specific findings.

I

[¶2] In 2006, Hehn was committed to the State Hospital as a sexually dangerous individual, and his commitment was affirmed on appeal. *In re Hehn*, 2008 ND 36, 745 N.W.2d 631. Hehn's subsequent petitions for discharge have been denied. *See In re Hehn*, 2016 ND 242, 888 N.W.2d 205; *In re Hehn*, 2015 ND 218, 868 N.W.2d 551; *In re Hehn*, 2013 ND 191, 838 N.W.2d 469; *In re Hehn*, 2012 ND 191, 821 N.W.2d 385; *In re Hehn*, 2011 ND 214, 806 N.W.2d 189. In November 2018, Hehn again petitioned the district court for review and discharge from civil commitment under N.D.C.C. § 25-03.3-18. He also requested appointment of an independent examiner.

[¶3] In September 2019, the district court held a hearing on his petition. The court received testimony from the State's expert, Dr. Erik Fox; the independent examiner, Dr. Jessica Mugge; and Hehn. Dr. Fox's October 2018 annual evaluation report was also received into evidence. Both experts ultimately agreed that Hehn continues to be a sexually dangerous individual. In October 2019, the court entered an order denying his petition, finding clear and convincing evidence that Hehn continues to be a sexually dangerous individual, who is likely to engage in further acts of sexually predatory conduct and who has serious difficulty controlling his behavior.

II

[¶4] We review civil commitments of sexually dangerous individuals under a modified clearly erroneous standard of review. *See In re Didier*, 2019 ND 263,

¶ 3, 934 N.W.2d 417; *In re Voisine*, 2018 ND 181, ¶ 5, 915 N.W.2d 647. This Court affirms a district court's order unless it is induced by an erroneous view of the law, or this Court is firmly convinced the order is not supported by clear and convincing evidence. *Voisine*, at ¶ 5.

[¶5] At a discharge hearing, the State bears the burden of proof to show by clear and convincing evidence the committed individual remains a sexually dangerous individual. N.D.C.C. § 25-03.3-18(4). Under N.D.C.C. § 25-03.3-01(8), to be committed as a "sexually dangerous individual," a person must meet the three statutory elements:

> (1) [T]he 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.

Didier, 2019 ND 263, ¶ 4 (quoting *Voisine*, 2018 ND 181, ¶ 6). To comport with the statute's language and constitutional substantive due process concerns, this Court has also explained:

> 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."

Didier, at ¶ 4 (quoting *Voisine*, at ¶ 6); *see Kansas v. Crane*, 534 U.S. 407, 411-13 (2002). "The court may consider sexual and nonsexual conduct demonstrating an individual's serious difficulty controlling behavior, but the presence of a mental disorder or condition alone does not satisfy the requirement of clear and convincing evidence that the individual is likely to engage in further sexually predatory conduct." *Didier*, at ¶ 4 (citing *Matter of R.A.S.*, 2019 ND 169, ¶ 7, 930 N.W.2d 162). We defer to the district court's determination that an individual has serious difficulty controlling behavior

when "it is supported by specific findings demonstrating the difficulty." *Didier*, at ¶ 4 (quoting *In re Johnson*, 2016 ND 29, ¶ 5, 876 N.W.2d 25).

III

[¶6] Hehn argues the district court erred in deciding the State had met its burden of proving by clear and convincing evidence that he remains a sexually dangerous individual. He concedes on appeal that the first two statutory elements have been met, as established by evidence of his previous convictions and his diagnosis of Borderline Personality Disorder. He challenges the court's conclusions on the third element and the *Crane* element.

[¶7] Hehn argues the district court's order makes no findings on the third element, but only states a legal conclusion on whether he is likely to engage in further acts of sexually predatory conduct. The court relied on Dr. Fox's report, finding it was uncontroverted. Hehn contends, however, the report was "controverted inasmuch as it relied on alleged acts, memorialized in Behavioral Acknowledgments ('write-ups')," which he denies occurred. He contends the court's lack of findings prevents him from understanding how it reached its legal conclusion and the court erred by failing to make specific findings supporting its conclusion he is likely to engage in further acts of sexually predatory conduct.

[¶8] Regarding the *Crane* element, Hehn argues the State did not prove by clear and convincing evidence that he poses any more of a threat than the typical criminal recidivist. Hehn contends that because he is incapable of changing his past, he is being denied an opportunity to earn his release from the State Hospital. He contends an individual's past history cannot establish a present-day determination and the district court made no findings about his ability to control himself.

[¶9] We reiterate that a district court must make sufficient findings to support its conclusions on the elements. This Court has described what constitutes sufficient findings for civil commitment decisions:

> Conclusory, general findings do not comply with N.D.R.Civ.P. 52(a), and a finding of fact that merely states a party has failed in [or has sustained] its burden of proof is inadequate under the rule. The court must specifically state the facts upon which its ultimate conclusion is based on. The purpose of the rule is to provide the appellate court with an understanding of the factual issues and the basis of the district court's decision. Because this Court defers to a district court's choice between two permissible views of the evidence and the district court decides issues of credibility, detailed findings are particularly important when there is conflicting or disputed evidence. This Court cannot review a district court's decision when the court does not provide any indication of the evidentiary and theoretical basis for its decision because we are left to speculate what evidence was considered and whether the law was properly applied. The court errs as a matter of law when it does not make the required findings.

Hehn, 2011 ND 214, ¶ 6 (quoting *Matter of R.A.S.*, 2008 ND 185, ¶ 8, 756 N.W.2d 771 (quotations and internal citations omitted)). "Detailed findings, including credibility determinations and references to evidence the court relied on in making its decision, inform the committed individual and this Court of the evidentiary basis for the court's decision." *Hehn*, at ¶ 6 (quoting *R.A.S.*, at ¶ 9). "We have continually recognized the need for detailed findings in commitment decisions." *Hehn*, at ¶ 6 (citing *Interest of Vondal*, 2011 ND 59, ¶¶ 8-9, 795 N.W.2d 343; *Interest of L.D.M.*, 2011 ND 25, ¶¶ 6-7, 793 N.W.2d 778; *Matter of T.O.*, 2011 ND 9, ¶¶ 4-5, 793 N.W.2d 204; *Matter of Voisine*, 2010 ND 17, ¶¶ 12-13, 777 N.W.2d 908; *Matter of Midgett*, 2009 ND 106, ¶¶ 8-9, 766 N.W.2d 717).

[¶10] In our prior decision in *Hehn*, 2011 ND 214, ¶¶ 7-8, we explained:

> In its order, the district court found Hehn was likely to engage in future sexually predatory conduct based on his "acts" and his "past history," but did not specify which "acts" or parts of Hehn's "past history" it based this conclusion on. The court also stated it based its finding that Hehn remains a sexually dangerous individual "upon the testimony of Dr. Sullivan . . . [whose] opinions deserve more weight than Dr. Riedel's, and the exhibits received[.]" The district court did not discuss the details of Dr.

> Sullivan's testimony or the specific exhibits and their content that served as the basis for its finding. The district court also failed to make any findings as to whether Hehn has serious difficulty controlling his behavior, which is necessary to satisfy substantive due process requirements. . . .
>
> Here, the district court did not specify the facts it relied upon in finding Hehn remains a sexually dangerous individual. Additionally, the district court did not make any findings regarding Hehn's ability to control his behavior. The district court has a duty to make independent findings, not merely to choose between competing expert opinions. *See Hehn*, 2008 ND 36, ¶ 21, 745 N.W.2d 631 (stating "[t]he importance of independent judicial decision-making means the judge, rather than the test scores or the psychologists who create them, is the ultimate decision-maker."). We conclude the district court erred as a matter of law in failing to make sufficient findings.

[¶11] Here, the district court's order denying the petition in the present appeal broadly relies on Dr. Fox's report and the experts' testimony and is similarly conclusory on the two relevant elements. The court held the State met its burden on the third element, finding both experts agreed and Hehn would be a risk if released to the community without support and further progress in treatment. The court generally stated:

> Based on the testimony, this Court finds that at this stage of treatment, there is clear and convincing evidence that the Respondent will engage in further acts of sexually predatory conduct. Although Mr. Hehn did make[] strides in controlling his behavior during this review period, further treatment and supervision is necessary to reduce the respondent's risk to the community. The Court relies on Dr. Fox's report, which is uncontroverted.

[¶12] The district court also generally stated that the State had met its burden on the *Crane* element:

> If an individual demonstrates serious difficulty controlling their behavior in the treatment setting, it is logical to conclude their behavior would not improve in a less restrictive environment.

> Although the respondent's behavior has improved, both experts acknowledge the difficulty in treating borderline personality disorder. Again, both experts agreed that this prong is met. The Court, again, relies on Dr. Fox's report, which is uncontroverted. . . . Based on the report and testimony, there is clear and convincing evidence that the Respondent will have serious difficulty controlling his behavior in a less restrictive environment.

[¶13] While there is agreement between the experts that Hehn remains a sexually dangerous individual, the district court's conclusory general findings are simply insufficient for civil commitment decisions. *See Hehn*, 2011 ND 214, ¶ 6. We therefore remand while retaining jurisdiction with instructions that the district court make required specific findings in support of its decision. *See, e.g.*, *Matter of Kulink*, 2018 ND 260, ¶ 10, 920 N.W.2d 446.

IV

[¶14] We conclude the district court did not make findings of fact sufficient to permit appellate review. We retain jurisdiction under N.D.R.App.P. 35(a)(3) and remand the court's order with instructions that, within thirty days from the filing of this opinion, the court make specific findings of fact on whether Hehn is likely to engage in further acts of sexually predatory conduct and whether Hehn has a present serious difficulty controlling behavior beyond that of a dangerous but ordinary criminal recidivist.

[¶15] Lisa Fair McEvers
Gerald W. VandeWalle
Jerod E. Tufte
Daniel J. Crothers
Jon J. Jensen, C.J.