ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
District Court No. 08-03-R-1253
Supreme Court No. 20030304

20030304

IN THE INTEREST OF
D.V.A.

Respondent/Appellant,

****

BRIEF OF RESPONDENT

****

Appeal from the Burleigh County District Court
Findings of Fact and Order for Commitment Entered September 18, 2003
Honorable Robert O. Wefald, Presiding District Judge

Todd A. Schwarz
Attorney for the Respondent/Appellant
115 North 4th Street
Bismarck, North Dakota 58501
(701) 224-6752
Bar ID# 04708

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
District Court No. 08-03-R-1253
Supreme Court No. 20030304

IN THE INTEREST OF D.V.A.	)
Respondent/Appellant,	)

****

BRIEF OF RESPONDENT

****

Appeal from the Burleigh County District Court
Findings of Fact and Order for Commitment Entered September 18, 2003
Honorable Robert O. Wefald, Presiding District Judge

Todd A. Schwarz
Attorney for the Respondent/Appellant
115 North 4th Street
Bismarck, North Dakota 58501
(701) 224-6752
Bar ID# 04708

TABLE OF CONTENTS

TABLE OF AUTHORITIES

page

State Cases

Statutes

ISSUES ON APPEAL

1. WHETHER THE STATE MET ITS BURDEN TO PROVE THAT D.V.A. IS A SEXUALLY DANGEROUS INDIVIDUAL BY CLEAR AND CONVINCING EVIDENCE.

2. WHETHER THE TRIAL COURT RELIED UPON INADMISSIBLE HEARSAY EVIDENCE TO MAKE A FINDING THAT D.V.A. IS A SEXUALLY DANGEROUS OFFENDER.

STATEMENT OF THE CASE

The matter before the court arose through a petition to involuntarily commit D.V.A. (hereinafter referred to as Don) as a sexually dangerous offender pursuant to N.D.C.C. Chapter 25-03.3. On June 25, 2003, a preliminary hearing was held before the Honorable Donald Jorgensen in which finding of probable cause was made. On September 17, 2003, a mental proceeding and treatment hearing was held at which time the Honorable Robert O. Wefald found that defendant was a sexually dangerous individual requiring involuntary commitment pursuant to N.D.C.C. § 25-03.1. In making this finding, the court relied upon two expert witnesses who testified that defendant is likely to re-offend if not committed. In hearing this evidence, the court allowed testimony by two expert witnesses who based their findings upon their own observations along with an interview of Don and relied upon records created by individuals who did not testify at the hearing. It is Don's position that the court did not have before it clear and convincing evidence in order to find him a sexually dangerous individual and that the court relied upon hearsay evidence reaching the conclusion.

STATEMENT OF FACTS

After the petition seeking to declare Don as a sexually dangerous individual was filed on June 18, 2003, he was evaluated by two psychologists, Dr. Joseph Belanger and Dr. Rosalie Etherington. After completing their evaluation these doctors submitted their findings to the court. These evaluation reports are contained in the Appendix. Dr. Belanger included his pages A-1 through A-37 and Dr. Etherington being included as page A-38 through A-43 of the Appendix. In preparing the reports from the evaluation, both doctors relied upon previous records obtained from numerous sources. These sources are North Dakota State Penitentiary records and other doctors' reports from previous evaluations of Don. Both psychologists relied upon the same set of facts and reached the same conclusion that defendant is a sexually dangerous individual requiring confinement pursuant to N.D.C.C. Chaper 25-03.3. The doctors found that he suffered from pedophilia with sexual attraction to both males and females. sexual sadism and antisocial personality disorder. Dr. Etherington in her report outlines the previous behavior which was considered on page 2 of her report where she indicates the following.

> *"In 1989 (he) was convicted of disorderly conduct, in which he spanked boys with belts. In 1992 he was charged with felonious restraint and G.S.I. of a 10-year-old girl. He is convicted of G.S.I. in 1996 after raping a 12-year-old-girl. During the rape he slapped her. While in NDSP he was found with drawings of naked females being spanked with written expressions begging for it to stop and that it hurt. NDSP treatment records*

reveal (Don's) description of his behavior as 'involving a hard spanking on the butts of the boys and girls he was offended against.' A recorded fantasy for individualized sex offender treatment with Dr. Hanlon revealed detailed desires of causing suffering to his victim. (Don's) fantasy was a 'very nice kid, does what he is told to do when he is told to do it', having sex with him. It further records that during this sexual encounter the boy is crying and screams in pain with insertion of objects into his anus. A Multiphasic Sexual Inventory completed by (Don) at NDSP in 1993 reveals several relevant statements: I get more excitement and thrill out of hurting a person than I do from the sex itself; I have forced someone to have anal or oral sex when they did not want to; I have beaten a person during a sexual encounter."

App. p. A-39 and A-40.

While not as concisely stated, Dr. Belanger relies on the exact same items to outline the history leading to a conclusion that Don is a sexually dangerous individual. Dr. Belanger's opinion that Don is a sexually dangerous individual as identified at N.D.C.C. Chapter 25-03.1 is based upon reports and opinions based on the records he reviewed including notes from the North Dakota State Penitentiary. Transcript (Tr.) page (p.) 44 lines (ln.) 13-25, p. 45 ln. 1-5. Dr. Etherington also testified that while performing her evaluation, she also relied upon records and documents from the state penitentiary and previous treatment providers as well as information obtained when speaking with Dr. Hanlon from the North Dakota State Penitentiary forming her opinion that Don was and is an individual subject to the provisions of N.D.C.C. Chapter 25-03.3. Tr. p 62, ln 11-25, p. 63 ln 1-4. Dr. Etherington testified that this is the standard method used by those in her profession. Tr. p. 63, ln 5-9. Identified in the report both doctors also

interviewed Don were outlined on page 1 of Dr. Belanger's report record review took place prior to an interview with Don. App. p. A-1

During the testimony of the doctors' on September 17, 2003, counsel for Don put forward numerous objections at the hearing on the grounds that the psychologists' testimony and opinions were based upon inadmissible hearsay. On each occasion, these objections were denied. Tr. p. 21 ln 14-16, p. 24 ln 15-19, p. 28 ln 16-17, p. 29 ln 3-23. Trial counsel explained his objections in detail indicating that the doctors were performing their evaluations, and now testifying in court, by merely reciting facts from other individuals who were not available for cross-examination. Tr. p. 29 ln 3-17. The Honorable Robert O. Wefald presiding over court responded to the objection as follows, "Again, Mr. Myerchin, I appreciate your objection, and I don't believe that this makes it objectionable in the context of having the doctor testify to what he relied upon in reaching his evaluation. So I note your objection and continued objection of the record. And, once again, I'm going to overrule it." Tr. p. 29 ln 18-23. After these objections, Dr. Belanger went on to further explain that he relied upon other items which were completely of a nonsexual nature performing his evaluation of Don. Reliance upon other doctors' statements that Don was a repeated runaway, that he had been truant from school and apparently had stolen nontrivial valued items without giving any indication what these items were and also that he had lied with

of occasions to complete his treatment with Dr. Hanlon. Tr. p. 57 ln 7-25, p. 58 ln 1-5. In fact, Dr. Belanger even testified that he was not intimately familiar with the NDSP rules and regulations as to whether or not administrative segregation would prevent an individual from treatment. Tr. p. 57 ln 16-19. Dr. Belanger made his conclusions indicating that Don was at a high risk to re-offend because he lacked treatment and Don's past behavior. Dr. Belanger's only knowledge of such critical behavior was obtained by records created by persons who did not testify at the hearing. He answered yes to the following question: "But yet part of your entire testimony here today for the basis of your opinions has in fact been on the record that you reviewed from the State Hospital; is that not a fair statement." Tr. p. 45 ln 15-19.

Dr. Etherington testified that she also reviewed all the records and evaluations from other doctors. Tr. p. 62 ln 11-25. Her evaluation was based in part upon information she received when she spoke with Dr. Hanlon from the state penitentiary. Tr. p. 63 ln 1-3. To support why she had done this, Dr. Etherington testified that this is what is normally done by individuals in her profession. Tr. p. 63 ln 5-9.

It is clear from reviewing both Dr. Etherington and Dr. Belanger's reports that their conclusions were virtually identical to those of the previous doctors who had performed evaluations on Don. The major difference between the two

the conclusion that the evidence would suggest that this was chronic. Tr. p. 30 ln 2-13. Dr. Belanger then went on to apply the information he has received from records and applied criteria used by those in the psychological profession to conclude that Don is likely to re-offend. Tr. p. 33 ln 11-25, p. 34-35, p. 36 ln 1. Dr. Belanger stated, "It is my best professional judgment that it may be concluded to a reasonable degree of professional certainty that the respondent is, indeed, likely to engage in additional acts of sexual predatory conduct, per virtue of mental disorder and personality disorder. Tr. p. 39 ln 16-20. Dr. Belanger explained that because he saw some problems in the prior records of antisocial-personality, sexual sadism and pedophilia and since certain risk reduction items were not present, such as completing treatment, that it is his final conclusion that Don was a sexually dangerous individual as defined by N.D.C.C. § 25-03.1-01(7). Tr. p. 39 ln 21-25, p. 40 ln 1-10.

Dr. Belanger's conclusion was tested on cross-examination by counsel for Don who established that Don indeed did not complete the sexual offender treatment program but that Dr. Belanger was not sure as to why he did not complete the sexual offender treatment program. The fact that Dr. Belanger stated that Don had voluntarily removed himself from treatment may have not been true. While he was removed from treatment on numerous occasions, it was that Don had been placed in segregation and therefore could not be in treatment on a couple

testifying psychologists' opinions is that Dr. Etherington also spoke with Dr. Doren in performing her risk assessment. Tr. p. 70 ln 1-6. Trial counsel for Don did object on the grounds that this was hearsay to which the court stated, "That's a statement." Tr. p. 70 ln 7-8. Dr. Etherington then testified that in her opinion there was a reasonable degree of professional and scientific certainty that Don was likely to engage in further sexual predatory conduct and that these disorders do not qualify as either an acquired or congenital disorder under the law. Tr. p. 73 ln 12-20.

Trial counsel for Don pointed out the fact that one of the items Dr. Etherington relied upon in basing her opinions was a 1992 charge of raping a young girl. He then pointed out that the charges were dismissed but there is no reference of that in her report. Tr. p. 75 ln 13-18. Trial counsel for Don also established that Dr. Etherington was not familiar with all the facts that she relied upon for past behavior that took place in the 1996 GSI conviction. Tr. p. 76 ln 2-9. Dr. Etherington had assumed that it was a child who was the victim of the GSI when in fact, from the criminal judgment, it was an adult. In reviewing the criminal judgment which was introduced as an exhibit by counsel for Don, this inaccuracy was found. Tr. p. 76 ln 15-23. Trial counsel for Don reiterated the problems with the termination of treatment while incarcerated established that Don had been making progress in treatment. Tr. p. 76 ln 24-25, p. 77 ln 1-17,

p. 77 ln 18-25, p. 78 ln 1-10.

Don's trial counsel also questioned Dr. Etherington regarding the least restrictive placement issues provided by N.D.C.C. Chapter 25-03. The crux of this question is whether or not Don should be confined if he were on probation from the 1996 conviction, and ordered to complete treatment and register as a sex offender. Tr. p. 79 ln 3-25, p. 80 ln 1-25. During this exchange, Dr. Etherington plainly admitted that she did not know that anyone on probation participated or was participating in sexual offender treatment programs. She stated plainly that she did not know of any. Tr. p. 80 ln 1.

LAW AND ARGUMENTS

WHETHER THE STATE MET ITS BURDEN TO PROVE THAT D.V.A. IS A SEXUALLY DANGEROUS INDIVIDUAL BY CLEAR AND CONVINCING EVIDENCE.

Hearsay evidence is not admissible unless a clearly defined exception applies. Rule 802, N.D. R. Evid. Hearsay is clearly defined as a statement " . . . other than the one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), N.D. R. Evid. Exceptions to the hearsay rule are outlined in Rules 803, 804 and 807 of the N.D. Rules of Evidence. None of these exceptions specifically outline that expert witnesses may rely upon hearsay evidence to which an exception does

not apply. Experts may testify to a scientific, technical or other specialized **knowledge** which will assist the trier fact and, from this **knowledge,** testify thereto to form opinions. Rule 702 N.D. R. Evid. Experts are permitted to base their opinions on facts which can then be tested on cross-examination. Rule 702, N.D. R. Evid.. The requirement that experts use facts and their knowledge to base opinions is the only guide provided by the rules of evidence. Rule 703, N.D. R. Evid.

The case at bar turns on the question of whether or not experts may use inadmissible evidence to form opinions which would not be admissible under the evidentiary rules. Clearly an opinion by an expert is only as good as the facts upon which he or she relied. If that expert is relying upon facts which otherwise would be inadmissible, the opinion is flawed. The opinion must be then deemed as inadmissible as the facts to which they relied upon to form the opinion. To do otherwise, and allow an expert witness to come in and use evidence that is unreliable under the rules, and make conclusions without the benefit of testing the facts in any meaningful way.

The whole basis of the hearsay exception is that hearsay is deemed categorically unreliable. The plain and simple reason is that the individual who made the statements is not present and subject to cross-examination which is the test for credibility and believability. In this case, psychologists were allowed to

testify, basing their opinions, on a large part upon records completed by individuals outside of their departments, to reach a conclusion that Don was and is an individual who is too dangerous to even be on the streets if he is subject to probation and treatment.

The dangerousness of this hearsay evidence is clearly outlined in this case from the opinions rendered by the psychologists. Dr. Etherington assumed that the 1996 GSI conviction involved a child when in fact it did not. And to further complicate matters Dr. Belanger did not even use the records correctly in order to get Don's birth date correct. Tr. p. 44, ln 8-11. When questioned about this inaccuracy, he responded by saying, "How would I know". Tr. p. 44, ln 13. These types of inaccuracies can occur and the hearsay rule is designated to prevent them.

At the hearing, none of the doctors who had previously rendered opinions nor any of the authors of the documents were available for cross-examination to support the alleged facts relied upon by the psychologists who did testify. The anticipated argument that these opinions should be admissible by the state is that this is what psychologists do in their profession. This raises the big issue of whether or not these psychologists, with their generally accepted practices, should be allowed to deprive people of their liberty as Don's is in this case. This court should require psychologists to use only admissible evidence and their knowledge

to form opinions as these formed here.

What is at stake is an individual's liberty and the required due process to deprive a person of that liberty. These guarantees come from the United States and North Dakota Constitutions. Constitutional rights cannot be overlooked to make it easier for the courts and the state. Simply put, the state must make sure that their experts in coming to conclusions rely upon documents and hearsay evidence which is outlined in the numerous exceptions to hearsay rules. These exceptions exist to allow judicial economy in circumstances where hearsay evidence which is clearly hearsay will be admissible and still have the guarantees of trustworthiness and reliability. This trustworthiness and reliability is the crux of the entire systems of justice. To do otherwise plainly allows experts to reach opinions that will result in the deprivation of an individual's liberty, when the facts that they have used are not reliable enough for the court to trust on its own.

WHETHER THE STATE MET ITS BURDEN TO PROVE THAT D.V.A. IS A SEXUALLY DANGEROUS INDIVIDUAL BY CLEAR AND CONVINCING EVIDENCE.

N.D.C.C. Chapter 25-03.1-03 sets forth the procedure to confine persons who are deemed sexually dangerous persons. North Dakota is not alone in enacting such provisions. Numerous states have done so as outlined by the court in *In Re: The Interest of M.D.*, 1999 ND 160, 598 N.W.2d 799. To confine a

person under North Dakota statutory provisions, the state must prove that he is a sexually dangerous individual by clear and convincing evidence. *M.D.* at 168. The state must prove that the person is a sexually dangerous individual who is likely to engage in further acts of sexual predatory conduct and that this is not something which is the result of mental retardation. N.D.C.C. § 25-03.1-01(7) . In reaching this conclusion, the court must have believe experts finding that this individual meets the definition of a sexually dangerous individual. N.D.C.C. § 25-03.1-13.

An appeal under the sexually dangerous individual commitment proceedings is limited in its review to the procedures, findings and conclusions of the committing court. As a result of this review standard, this court can determine if the facts relied upon by the committing court were sufficient to meet the clear and convincing standard. *In Re: M.B.K.*, 2002 ND 25, 639 N.W.2d 473. The Supreme Court in *M.B.K* indicates that the language in the statute does not require a percentage point contest. *M.B.K* at 29. It becomes whether or not the individual's liberty who is at question is likely to engage in further acts of sexual predatory conduct. Id.

In the instant case two expert testified that Don is likely to further engage in sexually predatory conduct. These opinions were based on evidence which they relied upon from other sources that were not tested in court as argued above.

It did so in such a fashion that the facts upon which they relied upon were not really known to them and therefore were not **knowledge** of theirs and therefore should be inadmissible. Further, the experts did not even have the facts straight themselves. Dr. Etherington testified that she was mistaken as to an assumption she made regarding the 1996 gross sexual imposition conviction against Don. She assumed the victim was a child when in fact it was an adult. Dr. Belanger testified that he had Don's birth date incorrect, and his excuse was "How would I know."

Both psychologists testified that they relied upon the records of individuals from the North Dakota State Penitentiary and other doctors who had given reports and statements to them. None of these people were available for cross-examination to test the accuracy of their statements in the records. It is no stretch of imagination that if psychologists Etherington and Belanger could make mistakes of this sort that the other individuals who produced records upon which they relied could also make such mistakes. It definitely inhibits clarity of their opinions and undermines the convincingness of their opinions as well. These two psychologists both agreed that they based their opinions largely on the other documentation provided by other individuals. This court or the committing court have no idea whether or not the other doctors made similar mistakes which would lead to a conclusion that Don is not likely to commit further acts of predatory conduct.

An issue which was not explored by either of the psychologists who testified was whether or not their conclusion that Don is someone likely to engage in sexually predatory conduct is based on mental retardation. The doctors in their reports indicate that he is very low functioning. Dr. Etherington even admits that Don is a very low functioning individual. Tr. p. 77 ln 25, p. 78 ln 1-4. As a result of this low intellect and none of the doctors exploring whether or not this was in fact a mental retardation issue, the state has not met its burden. The only solution is for the court to remand this case to determine the issue of wether or not mental retardation plays any factor in the findings by either of the two psychologists who testified.

If this court fails to remand this issue to the previous court to determine the issue of whether mental retardation plays any factor in this case sets a dangerous precedent for this as well as future cases. To allow individuals who are borderline mentally retarded and fully mentally retarded to be subject to commitment as sexually dangerous individuals contrary to the statute. The state having not presented evidence on the issue of mental retardation means that they have not met their burden of proof and therefore have not established all of the facts required for a commitment under N.D.C.C. Chapter 25-03.1.

CONCLUSION

Don's commitment as a sexually dangerous individual pursuant to N.D.C.C. Chapter 25-03.1 is based upon the testimony of expert witnesses relied upon inadmissible hearsay evidence in forming their opinions. Don was committed without clear and convincing evidence because the experts relied upon an inadmissible evidence to form their conclusions. Lastly, the state did not produce evidence indicating that the conclusion that Don was a sexually dangerous individual that was not the result of mental retardation. For the reason herein stated a reversal of the commitment order, or at the very least a remand to determine whether mental retardation plays any part of the opinions expressed by the psychologists who testified, is required.

Respectfully submitted.

Dated this 9th day of January, 2004.

Todd A. Schwarz
Attorney for the Respondent/Appellant
115 North 4th Street
Bismarck, North Dakota 58501
(701) 224-6752
Bar ID# 04708