

20040319

ORIGINAL

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT MAY 19 2005

In the Interest of L.D.M.

)
)
) Supreme Court No. 20040319

)
) District Court No. 40-04-R-19
)

APPEAL FROM ORDER FOR CIVIL COMMITMENT
PURSUANT TO NDCC CHAPTER 25-03.3

NORTHEAST JUDICIAL DISTRICT

THE HONORABLE LESTER KETTERLING PRESIDING

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 18 2005

STATE OF NORTH DAKOTA

BRIEF OF APPELLANT

William R. Hartl (ID 05213)
130 South Main
P.O. Box 319
Rugby, North Dakota 58368
(701) 776-5150

ATTORNEY FOR APPELLANT
L.D.M.

TABLE OF CONTENTS

Table of Authorities ii

I. Statement of the Case 1

II. Statement of the Facts 2

III. Issues 4

IV. Law and Argument 4

 1. THE STATE OF NORTH DAKOTA DID NOT
 PRODUCE TWO EXPERTS TO INDEPENDENTLY
 ESTABLISH THE ELEMENTS REQUIRED FOR CIVIL
 COMMITMENT OF LARRY AS A SEXUALLY
 DANGEROUS INDIVIDUAL 4

V. Conclusion 9

TABLE OF AUTHORITIES

Cases

<i>In Re M.B.K.</i> , 2002 ND 25, 639 NW2d 473.....	4, 6, 9
<i>In the Interest of M.D.</i> , 1999 ND 160, 598 NW2d 799.....	5
<i>Kansas v. Crane</i> , 122 S.Ct. 867 (2002)	5

Statutes

§ 25-03.3-12, N.D.C.C.	3
§ 25-03.3-13, N.D.C.C.	5, 6, 7, 9
§ 25-03.3-19, N.D.C.C.	4

I. STATEMENT OF THE CASE

On March 16, 2004, the Rolette County States Attorney filed a Petition for Commitment of a Sexually Dangerous Person in which the State sought to have L.D.M. (hereinafter referred to as "Larry") involuntarily committed as a sexually dangerous person under North Dakota Century Code Chapter 25-03.3. A probable cause hearing was held on March 29, 2004, and Larry orally waived his right to the probable cause hearing and consented to extensions for the purpose of evaluations. Tr-1. at 8-9.¹ A commitment hearing was held on November 4, 2004 after which the District Court, the Honorable Lester Ketterling presiding, found Larry to have an anti-social personality disorder that makes him "likely to engage in further acts of sexually predatory conduct which constitutes a danger to the physical or mental health or safety of others." Appendix at 10. Therefore, the District Court ordered that Larry be "committed to the care, custody and control of the executive director of the department of human services. . . ." Id. (Com Order, page 2). Larry filed a Notice of Appeal on November 23, 2004.

1

Two transcripts have been prepared: a transcript of the March 29, 2004 proceedings which includes pages 1 - 17, and separate transcript of the November 4, 2004 proceedings which includes pages 1 - 179. The March 29, 2004 transcript will be cited as "Tr-1," and the November 4, 2004 transcript will be cited as "Tr-2."

II. STATEMENT OF FACTS

Larry was convicted in Rolette County, North Dakota of Gross Sexual Imposition and sentenced to serve 10 years at the North Dakota State Penitentiary. Appendix at 4 & 6. Prior to Larry's release, the State filed a Petition for Commitment of a Sexually Dangerous Person pursuant to North Dakota Century Code Chapter 25-0.3 in which the State alleged that Larry was a sexually dangerous individual and sought to have Larry civilly committed. Appendix at 2.

A Preliminary Hearing - Probable Cause was held on March 29, 2004, and Larry orally "waived his right to the probable cause hearing and consented to extensions that may be necessary during the course of the evaluations." Appendix at 9.

Larry was evaluated at the North Dakota State Hospital by Dr. Joseph Belanger, a licensed psychologist employed by the North Dakota Department of Human Services and also by Jamestown College. Tr-2. at 2 & 7. Larry was also evaluated by Dr. Rosalie Etherington, a licensed psychologist who is also employed by the North Dakota State Hospital and who is an adjunct professor at Jamestown College. Tr-2. at 65-66 & 68. In addition, Larry exercised his right to an independent evaluation under North Dakota Century Code section

25-3.3-12², and Dr. Robert Gulkin, a clinical psychologist conducted a third evaluation. Tr-2. at 107 & 109.

A commitment hearing was held on November 4, 2004 and all three of the above psychologists testified. Dr. Belanger reviewed Larry's file and interviewed Larry on three separate occasions. Tr-2. at 8-9. Dr. Belanger diagnosed Larry as having an "antisocial personality disorder with additional borderline features" and alcohol abuse. Tr-2. at 10. Dr. Belanger outlined three instruments he used to aid in determining whether Larry was likely to engage in further acts of sexually predatory conduct - the RRASOR, the STATIC 99, and the MnSOST-R. Tr-2. at 42-43. Based on these three tests and Larry's past history, Dr. Belanger believed that there is reason to believe that Larry "is at risk for additional acts of sexually predatory conduct." Tr-2. at 41. However, Dr. Belanger did indicate that while Larry was incarcerated from October, 1993 to March, 2004 he was never taken out of the North Dakota State Penitentiary and charged with a sexual crime. Tr-2. at 54.

Dr. Etherington also reviewed Larry's file and interviewed Larry at the North Dakota State Hospital. Tr-2. at 68-69. Dr. Etherington diagnosed Larry as

²

"Whenever a respondent is subject to an evaluation pursuant to this chapter [North Dakota Century Code Chapter 25-03.3], the respondent may retain an expert to perform an evaluation or testify on the respondent's behalf." North Dakota Century Code §25-03.3-12.

having antisocial personality disorder and that such disorder creates "at least the initial reason to believe that [Larry] will in fact engage in future sexually predatory conduct. . . ." Tr-2. at 91. Dr. Etherington did indicate that Larry had not exhibited assaultive behavior for the past year and a half, and that he had no assaultive behavior at the State Hospital. Tr-2. at 101-102.

Dr. Gulkin testified on Larry's behalf and indicated that he also found Larry to have an antisocial personality trait. Tr-2. at 110. Dr. Gulkin concurred with the actuarial assessments conducted by the State Hospital which indicated a high risk for committing future sexual offenses. Tr-2. at 133.

III. ISSUES

1. DID THE STATE OF NORTH DAKOTA PRODUCE TWO EXPERTS TO INDEPENDENTLY ESTABLISH THE ELEMENTS REQUIRED FOR CIVIL COMMITMENT OF LARRY AS A SEXUALLY DANGEROUS INDIVIDUAL?

IV. LAW AND ARGUMENT

1. THE STATE OF NORTH DAKOTA DID NOT PRODUCE TWO EXPERTS TO INDEPENDENTLY ESTABLISH THE ELEMENTS REQUIRED FOR CIVIL COMMITMENT OF LARRY AS A SEXUALLY DANGEROUS INDIVIDUAL.

An appeal from an order of commitment is "limited to a review of the procedures, findings and conclusions of the committing court." North Dakota Century Code §25-03.3-19. The "standard of review for appeals from commitments of sexually dangerous individuals under N.D.C.C. ch. 25-03.3 is a 'modified clearly erroneous' standard." In Re M.B.K., 2002 ND 25, ¶9, 639

N.W.2d 473, 476 (N.D. 2002), citing In the Interest of M.D., 1999 ND 160, ¶34, 598 N.W.2d 799. The North Dakota Supreme Court will “affirm a trial court’s order of committal ‘unless it is induced by an erroneous view of the law or [unless the Court is] firmly convinced it is not supported by clear and convincing evidence.’” Id.

The United States Supreme Court has consistently upheld [] involuntary commitment statutes’ when (1) ‘the confinement takes place pursuant to proper procedures and evidentiary standards,’ (2) there is a finding of dangerousness either to one’s self or to others,’ and (3) proof of dangerousness is ‘coupled . . . with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’

Kansas v. Crane, 122 S.Ct. 867, 869 (2002). The North Dakota Legislature has established the procedure for the involuntary commitment of sexually dangerous individuals and such procedure is codified in North Dakota Century Code Chapter 25-03.3.

Section 25-03.3-13 of the North Dakota Century Code provides that:

An individual may not be committed [as a sexually dangerous individual] unless evidence is admitted establishing that at least two experts have concluded the individual 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.

North Dakota Century Code §25-03.3-13.

Therefore, the State must produce two experts to independently establish two elements: (1) that the respondent has some sort of disorder and (2) that disorder makes him or her 'likely to engage in further acts of sexually predatory conduct. In Re M.B.K., 2002 ND 25, ¶11, 639 N.W.2d 473, 476 (N.D. 2002) (emphasis added).

The State produced two experts, Dr. Belanger and Dr. Etherington, and Larry produced a third expert, Dr. Gulkin. Tr-2. at 2 & 7; Tr-2. at 65-66 & 68; Tr-2. at 107 & 109. All three experts diagnosed Larry with an anti social personality disorder and concluded that Larry was likely to engage in additional future acts of sexually predatory conduct. Tr-2. at 41, 91 and 133. Despite this however, the State did not produce two independent experts to establish the two elements required under North Dakota Century Code section 25-03.3-13.

Dr. Gulkin was an expert for Larry, not for the State, and thus his evaluation cannot be used and considered for purposes of the State producing two independent experts to establish the two elements required under North Dakota Century Code section 25-03.3-13. The States experts, Dr. Belanger and Dr. Etherington cannot be considered independent experts since they both are employed by the North Dakota Department of Human Services. Tr-2. at 2 & 65. In addition to their joint employment at the North Dakota Department of Human

Services, both Dr. Belanger and Dr. Etherington are employed by Jamestown College. Tr-2. at 2 & 65-66.

Two experts who are jointly employed by not one, but by two of the same employers, cannot be argued to be "independent experts" as the State is required to produce under section 25-03.3-13 of the North Dakota Century Code. Through the course of their joint employment, Dr.'s Belanger and Etherington are naturally going to confer and consult with each other on cases they are handling or patients they are seeing. In addition, Dr. Etherington testified that both she and Dr. Belanger consult with Dr. Dorum when doing "sexual dangerousness assessment." Tr-2. at 96. So, not only do Dr. Belanger and Dr. Etherington have the ability to consult with each other through the natural course of their employment at the North Dakota State Hospital, part of their procedure when doing sexual dangerousness assessments requires each of them to also consult with Dr. Dorum. Furthermore, Dr. Belanger and Dr. Etherington do not note any differences they individually determine when performing their sexually dangerous assessments on an individual, but rather they "come together" at the end and "correct" their differences before they each complete their "final report and the final scoring." Tr-2. at 96-97.

In short, there is absolutely nothing independent at all about the assessments performed on Larry by Dr. Belanger and Dr. Etherington. Both doctors work at the North Dakota State Hospital where they both performed their evaluations of Larry. Both doctors have the ability to consult with each

other at the North Dakota State Hospital, and in fact both doctors actually consult with Dr. Dorum regarding their evaluations of Larry. Finally, neither Dr. Belanger nor Dr. Etherington notes any differences they find when evaluating Larry, but rather they get "together and confer" and "correct" any differences they have regarding Larry's evaluation before making their final report.

Therefore, while the State presented Dr. Belanger and Dr. Etherington as the State's two experts to independently establish the elements required under North Dakota Century Code section 25-03.3-13, it is abundantly clear that Dr. Belanger and Dr. Etherington are not two independent experts, but rather are two experts who jointly prepared and expressed the same, single diagnosis.

Dr. Belanger's and Dr. Etherington's evaluations are included in the Appendix, Dr. Belanger's being Appendix pages 14 - 24, and Dr. Etherington's being Appendix pages 25 - 31. It is telling to compare the conclusions contained within both Dr. Belanger's and Dr. Etherington's Psychological Evaluations. Dr. Belanger's conclusion is contained within the last paragraph, page ten, and in the following two paragraphs on page eleven of his report. Appendix at 23 - 24. Dr. Etherington's conclusion is contained on page seven of her report. Appendix at 31. When the content of both doctor's evaluations, and especially the content of both doctor's conclusions is compared, it is evident that the evaluations are the product of a joint effort conducted by non-independent examiners with minimal verbiage being inserted or removed from their reports in an effort to attempt to present "two independent" evaluations

which satisfy the elements required to civilly commit an individual as a sexually dangerous individual under North Dakota Century Code section 25-03.3-13.

Since the State did not present two independent experts to establish the elements required under North Dakota Century Code section 25-03.3-13, it has not met the burden of proof and it has therefore not established all of the elements required for the civil commitment of Larry under North Dakota Century Code section 25-03.3-13

V. CONCLUSION

Larry's commitment as a sexually dangerous individual is based upon the State having produced two non-independent experts to establish the elements required by North Dakota Century Code section 25-03.3-13. The State's experts were jointly employed, they both consulted with Dr. Dorum regarding Larry's evaluations, and they even got together and conferred with each other regarding their evaluation of Larry. Since the State did not "produce two experts to independently establish" the two elements required under North Dakota Century Code section 25-03.3-13, the Court should reverse the commitment order entered by the district court. In Re M.B.K., 2002 ND 25, ¶11, 639 N.W.2d 473, 476 (N.D. 2002).

Respectfully submitted this 17th day of May, 2005.

A handwritten signature in black ink, appearing to read 'William R. Hartl', written over a horizontal line.

William R. Hartl (ID 05213)

P.O. Box 319

130 South Main

Rugby, North Dakota 58368

(701) 76-5150

Attorney for Respondent-Appellant

L.D.M.