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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20100290

In the Matter of Jeffrey K. Wolff.

Cass County State's Attorney,

Petitioner - Appellee,

vs.

Jeffrey K. Wolff,

Respondent - Appellant.

APPELLEE'S BRIEF

**Appeal from August 9, 2010 Order for Continued Commitment
as a Sexually Dangerous Individual
East Central Judicial District
District Court File No. 09-05-R-01063
The Honorable John C. Irby, Judge**

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[¶3] ISSUES PRESENTED

- I. [¶4] Whether the State has proven by clear and convincing evidence that Wolff has serious difficulty controlling his behavior.

[¶5] STATEMENT OF THE CASE

[¶6] The State concurs with the Statement of the Case provided in Wolff's Brief, dated December 3, 2010.

[¶7] STATEMENT OF THE FACTS

[¶8] The State generally concurs with the Statement of Facts provided within Wolff's brief, with the following clarifications and additions. As an introduction to the pertinent players, Dr. Sullivan testified as the State's expert, Dr. Reidel was Wolff's most recent independent expert and Dr. Gilbertson, who was referred to within Dr. Reidel's report, was Wolff's independent expert at a prior time.

[¶9] 1. In his brief, Wolff quotes Dr. Sullivan's discussion of Wolff's behavior.

(Wolff's Brief, pg.3) The quote is accurate as far as it goes, but stops a bit short. After stating Wolff has been irritable and aggressive towards staff, Sullivan continued: "He has punched and kicked them at times. These are behaviors that have been repeated across years while he has been at the State Hospital. He has been quite irresponsible in his poor performance in treatment. And he appears to lack remorse for what he did to his victim. He called one of them a piece of ass. So he's basically demonstrated many different traits of Antisocial Personality Disorder." (T 14)

[¶10] 2. In his brief Wolff quotes Dr. Riedel as opining Wolff has a "reasonable ability" to control his sexual behavior and that he is more like a typical criminal than a sex offender. (T 65-66). While Wolff accurately portrays Dr. Riedel's testimony in that regard, it is worth noting that this brief comment is all Dr. Riedel had to say in testimony on the

subject of Wolff's ability to control his behavior. In his report, Dr. Riedel stated that "I am in agreement with Dr. Gilbertson who states '... Mr. Wolff, for all his other difficulties, i.e., antisocial inclinations, failure to register as a sex offender and failure to complete sex offender treatment, would, in my opinion more resemble the average released prison *sexual* offender and not meet the higher likelihood of risk required by the SDI statute.'" (Riedel's Report, p.46, Docket #130)(emphasis added).

[¶11] 3. Upon cross-examination, Dr. Riedel acknowledged that egocentric and impulse control issues were central in Wolff's initial civil commitment. He further testified that although Wolff admits antisocial behaviors, he now denies impulse control and egocentricity issues. Wolff's related testing gives results which are not totally valid or reliable, according to Dr. Reidel. (T 69)

[¶12] 4. Within his report, Dr. Reidel stated that neither the MNSOST-R results of 30%, nor the Static-99R results of 48.6%, shows that Wolff meets "the standard". (Reidel's Report, p.46, Docket #130) Dr. Riedel's understanding of the North Dakota "standard" for civil commitment of a sexual predator does not appear to be "likely to engage" as found in N.D.C.C. §25-03.3-01(8) and §25-03.3-13, but rather "more likely than not to engage", meaning "50% or greater". (T 73-74)

[¶13] 5. Other pertinent facts are referenced, as appropriate, throughout this Brief.

[¶14] The State refers to the North Dakota State Hospital as “NDSH” and a sexually dangerous individual as “SDI” throughout the remainder of this brief.

[¶15] ARGUMENT

[¶16] I. **Standard of Review.**

[¶17] This Court applies a modified clearly erroneous standard to review civil commitments of sexually dangerous individuals. Matter of Voisine, 2010 ND 17, ¶8, 777 N.W.2d 908. This Court will affirm a district court's decision unless the court's order is induced by an erroneous view of the law, or this Court is convinced the order is not supported by clear and convincing evidence. Id.

[¶18] II. **The State has proven, and Wolff does not contest, that Wolff meets the statutorily articulated elements for a sexually dangerous individual.**

[¶19] A sexually dangerous individual is one who has engaged in sexually predatory conduct and has a congenital or acquired condition that is manifested by a sexual disorder, 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. N.D.C.C. §25-03.3-01(8). The State has the burden of proving the individual meets this statutory criteria by clear and convincing evidence. N.D.C.C. §25-03.3-13; Matter of Rush, 2009 ND 102, ¶9, 766 N.W.2d 720.

[¶20] As a matter of context, Wolff does not argue the State failed in its proof of the statutorily articulated elements, nor does he argue the District Court erred in finding Wolff met the statutorily articulated definition of a sexually dangerous individual. The State asserts that the evidence it provided the District Court amply

satisfied the statutory elements required for civil commitment under N.D.C.C. Chapter 25-03.3.

[¶21] Section III below addresses Wolff’s sole appellate issue, the requirement that the State show Wolff has serious difficulty controlling his behavior.

[¶22] **III. The State has proven, and the District Court did not err in finding, by clear and convincing evidence that Wolff has serious difficulty controlling his behavior.**

[¶23] Wolff argues that the District Court’s findings of fact do not sufficiently articulate its thinking, and that the State’s evidence and the District Court’s analyses are insufficient to conclude Wolff has serious difficulty controlling his behavior. (Wolff’s Brief, p.6) Both arguments are addressed below.

[¶24] A. Background on Serious Difficulty Controlling Behavior

[¶25] In addition to the statutorily articulated elements reflected in N.D.C.C. Chapter 25-03.3, this Court has stated there must also be proof the committed individual has serious difficulty controlling his behavior to satisfy substantive due process requirements. Matter of R.A.S., 2008 ND 185, ¶6, 756 N.W.2d 771 (citing Kansas v Crane, 534 U.S. 407, 413 (2002)). This Court has described the substantive due process requirement not as a “fourth prong” of N.D.C.C. §25-03.3-01(8), but rather as a part of the definition of a sexually dangerous individual. Matter of Vantreece, 2009 ND 152, ¶6, 771 N.W.2d 585. This Court has thus construed the definition of a sexually dangerous individual to require “a nexus between the [individual’s] disorder and dangerousness, proof of which encompasses evidence

showing the individual has serious difficulty in controlling his behavior, which suffices to distinguish a sexually dangerous individual from other dangerous persons.” Id. (quoting Matter of G.R.H., 2008 ND 222, ¶7, 758 N.W.2d 719). The United States Supreme Court does not require a sexual offender be completely unable to control his behavior, but the Constitution precludes commitment of a dangerous sexual offender without any lack-of-control determination. Vantreece, 2009 ND 152, ¶8, 771 N.W.2d 586 (quoting Crane stating that the inability to control behavior is not demonstrable with mathematical precision). Rather, proof must be of a nature that distinguishes the dangerous sexual offender from the dangerous but typical recidivist convicted in an ordinary criminal case. Id. at ¶9 (citing Crane).

[¶26] The State must provide sufficient proof, by expert evidence within the record, such that a district court as the ultimate decision-maker can conclude an individual has serious difficulty controlling his behavior. Id. at ¶12. Although one possibility is that an expert will explicitly opine the respondent is unable to control his behavior, that is not required. Id.

[¶27] B. Findings of Fact are Sufficient

[¶28] Wolff’s claim of inadequate and conclusory fact findings by the District Court appears akin to a N.D.R.Civ.P. 52(a) argument. Rule 52(a) requires a court in a civil action tried without a jury to “find facts specially and state separately its conclusions of law”. This Court has found in the civil commitment context that “conclusory, general findings” do not comply with Rule 52(a). *See, e.g., In re T.O.*,

2011 ND 9, ¶4, ___ N.W.2d ___; In re R.A.S., 2008 ND 185, ¶8, 756 N.W.2d 771. In both referenced cases the district courts issued one-sentence conclusions that respondent remained a SDI by clear and convincing evidence. In those cases the district courts apparently did not, verbally or in writing, provide a basis for those conclusions. This Court explained the purpose behind Rule 52(a) was to provide an appellate court an understanding of the facts and basis for a district court’s decision. R.A.S., ¶18. Because this Court defers to a district court’s choice between two permissible views of evidence and defers to its decisions regarding credibility issues, detailed findings are important where evidence is disputed. Id. This Court cannot review a district court’s decision where the district 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.” Id. See also, In re Midgett, 2010 ND 98, ¶11, 783 N.W.2d 27.

[¶29] The State acknowledges that the only finding of fact which contains the express words “serious difficulty controlling his behavior” is Finding of Fact #11. (A-15) That finding states: “He demonstrates serious difficulty in controlling his behavior even in a structured setting such as the North Dakota State Hospital. He has acted inappropriately toward staff and has been written up for rule violations several times.” The State asserts this finding is sufficient by itself to comply with Rule 52(a). However, whether or not #11 is sufficient to draw a complete conclusion, it ought not be read in isolation. It is one of fifteen findings of fact articulated by the court, many

of which connote the District Court's related thinking (e.g., #6 – actuarial risk assessment scores, #7 - Wolff's psychopathy, #8 – Wolff's behavior as noted in the penitentiary's charts, #9 - Wolff's lack of empathy for his victim and his comments about women being just objects to him, #10 – minimal treatment progress). (A-14, A-15) Those findings are supported by the written reports by both experts, supplemented by the testimonial evidence of both, a significant portion of which is undisputed. Rule 52(a) does not require a district court to follow a strict format for its findings, such as having all items relating to one topic captured within that one finding, and thereby requiring the court to repeat those items in various findings if an item relates to more than one topic. The District Court's findings in Wolff's case satisfy Rule 52(a) and sufficiently articulate facts upon which a reviewing court can understand the bases for the District Court's conclusion.

[¶30] C. Wolff has Serious Difficulty Controlling His Behavior.

[¶31] Wolff argues that neither the evidence nor the District Court's analysis supports a conclusion that Wolff has serious difficulty controlling his behavior.

[¶32] Wolff alleges the District Court's conclusion is based solely on the presence of his antisocial personality disorder. (Wolff's Brief, p.7-8) He argues the court's conclusion must mean that anyone who is found to meet the second prong (congenital or acquired condition) because of antisocial personality disorder would also mean they automatically have serious difficulty controlling their behavior. He further argues that such an approach violates Interest of J.M., 2006 ND 96, ¶10, 713

N.W.2d 518, and is repugnant to Crane.

[¶33] Wolff's argument is misplaced on this record. In Interest of J.M., this Court stated "[a] diagnosis of antisocial personality disorder does not, per se, establish a nexus between the requisite disorder and future dangerousness. The evidence must clearly show the antisocial personality disorder is likely to manifest itself in a serious difficulty in controlling sexually predatory conduct." Id. at ¶10. In Wolff's case, the evidence given by Dr. Sullivan, taken in its entirety, together with her specific testimony that Wolff's antisocial personality disorder with borderline traits makes him likely to have serious difficulty controlling his behavior and that he is likely to re-offend (T 34), provides the kind of evidence required under the law.

[¶34] A closer look at the rest of the record is warranted to get a more complete picture. Dr. Sullivan testified Wolff has serious difficulty controlling his behavior and that difficulty is tied to his diagnosis of antisocial personality disorder. (T 34) That was not the whole of her testimony. In support of her conclusion Dr. Sullivan referred to a statement by Wolff that "he is afraid that he might not make it once he is released from the State Hospital", that "he considers women to be merely sexual objects for his own use" and when confronted on that statement Wolff responded "that's how I am and that's just too bad". (T 32-33) Dr. Sullivan testified that Wolff's "continued acting out in one of the most secure environments we can possibly provide in the state, indicate that he would either be unlikely or unwilling to control his behavior in a lessor (sic) controlled environment such as the community". (T 33)

Dr. Sullivan also testified that “supervision provides some degree of control and observations” over an individual, Wolff would need “some measure of control and confinement” if released to the community and that she understands Wolff is no longer subject to any such supervision. (T 34) She testified Wolff is “extremely psychopathic” and that condition means he is “unusually willing or unable to control his behavior and to use other people to a (sic) achieve his own ends.” (T 35) Dr. Sullivan also testified that Wolff has not participated in “any meaningful sex offender treatment to date”. (T 35) Dr. Sullivan acknowledged Wolff has not engaged in any sexually predatory behavior during the review period, but stated that does not mean *he* has the ability to control his behavior, but rather means *NDSH* is controlling his behavior. (T 51-52) She noted that Wolff admitted he sexually acted out with a peer/roommate at NDSH. (T 54)(Sullivan’s Report, p.16 (entry dated 2/26/10), Docket #126) She also testified that Wolff’s preferred victim pool (for his past predatory conduct) was teenage females, who are not present at NDSH. (T 54-55) As to other behavior, Dr. Sullivan noted that Wolff had threatened to hit NDSH staff if they moved him to another location within the facility, he hit walls and doors, kicked a chair and was demeaning to female staff. (T 47-48) Within her report, Dr. Sullivan noted that Wolff’s disorder “predisposes him to act impulsively and to disregard the wishes, rights, and safety of others in order to achieve his own ends”. (Sullivan’s Report, p.7, Docket #126).

[¶35] Dr. Sullivan also utilized actuarial tools in her analysis. She stated that

Wolff's MNSOST-R score placed him in a "high" risk category. (Sullivan's Report, p.2, Docket #126)(T 29-30). Dr. Reidel agreed he falls into the high risk category. (Reidel's Report, p.36-41, Docket #130)(T 61) Dr. Sullivan also concluded that Wolff's Static-99R score of 7 placed him in a "high" risk category, with a recidivism rate of "48.6% @ 10 years", meaning Wolff was "3.8 times more likely to resexually (sic) reoffend than the average sex offender" in the sampling data. (Sullivan's Report, p.2, Docket #126)(T 16-17, 30) Dr. Reidel agreed that tool shows he is high risk. (Reidel's Report, p.35, 45, Docket #130)(T 60) Dr. Sullivan concluded Wolff has an antisocial personality disorder with borderline traits. (Sullivan's Report, p.1, Docket #126)(T 13) Somewhat differently, Dr. Riedel concluded Wolff has a personality disorder, not otherwise specified with borderline, antisocial, narcissistic features, but Dr. Reidel stated that he and Dr. Sullivan do not really differ in their diagnosis. (Riedel's Report, p.42, Docket # 130)(T 62)

[¶36] Dr. Sullivan concluded Wolff's PCL-R total score of 39 out of 40 indicates he has more psychopathic traits overall than 99% of the psychiatric patients in the normative sample, meaning that he is "unusually detached, cold, grandiose, manipulative, willing to lie and lacking in empathy and remorse. These traits make it highly likely that he will act in ways that harm others with little or no regard for their feelings or welfare, possibly including in a sexually offensive manner. (Sullivan's Report, p.2, Docket #126)(T 34-35) Dr. Sullivan further wrote that his antisocial personality disorder predisposes him to act impulsively and disregard the wishes,

rights and safety of others in order to achieve his own ends. (Sullivan's Report, p.7, Docket #126) Dr. Riedel reached a lower psychopathy score for Wolff, but also concluded his score was "quite high". (Riedel's Report, p.42, Docket #130)

[¶37] Wolff's participation in and motivation for treatment varied across time. (Sullivan's Report, p.3-6, Docket #126) Dr. Sullivan concluded he has not successfully engaged in treatment. (T 35)

[¶38] Contrary to Dr. Sullivan, Dr. Riedel testified that Wolff has shown a "reasonable ability to control his sexual behavior". However, he also testified that "I don't think he is very good at controlling his other antisocial behaviors." (T 66) Dr. Riedel's conclusion seems to spring from Dr. Riedel's report wherein he stated that he agrees with Dr. Gilbertson (former independent expert for Wolff), quoting him as saying that Wolff, "for all his other difficulties, i.e., antisocial inclinations, failure to register as a sex offender and failure to complete sex offender treatment, would, in my opinion, more resemble the *average released prison sexual offender* and not meet the higher likelihood of risk required by the SDI statute." (Riedel's Report, p.46, Docket #130)(emphasis added) One problem with that conclusion, both from Dr. Gilbertson and apparently adopted by Dr. Riedel, is with their alleged standard of "average released prison sex offender". The North Dakota standard relating to the ability to control behavior is not the "average released sex offender", but rather a "typical recidivist convicted in an ordinary criminal case". Vantreece, 2009 ND 152, ¶9, 771 N.W.2d 586.

[¶39] Although Drs. Sullivan and Riedel agreed in many areas, they disagreed on Wolff's ability to control his behavior. In cases of conflicting testimony, the evaluation of the credibility of conflicting evidence is "solely a trial court function". Matter of A.M., 2010 ND 163, ¶19, 787 N.W.2d 752 (citing other cases); R.A.S., 2009 ND 101, ¶10, 766 N.W.2d 712. In Finding of Fact #14, the District Court in Wolff's case said of Dr. Riedel that although he "tested Wolff extensively, it did not appear that Wolff's actual behavior and lack of progress in his sex offender treatment were adequately considered." (A-15) With that finding the District Court signaled Dr. Riedel had not addressed some topic areas the District Court considered important. With that finding, together with its other findings, the District Court supported its analysis that Wolff has serious difficulty controlling his behavior (A-18), and its ultimate conclusion that Wolff's Petition for Discharge be denied.

[¶40] CONCLUSION

[¶41] The State asserts the District Court's Order for Continued Commitment, dated August 9, 2010, is amply supported by the evidence, the District Court did not err in denying Wolff's discharge petition and Wolff should continue to be civilly committed pursuant to N.D.C.C. Chapter 25-03.3 and related law. For the reasons set forth, and in recognition of the modified clearly erroneous standard of review, the State respectfully requests this Honorable Court affirm the District Court's order for continued commitment.

Respectfully submitted this 18th day of January, 2011.

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[¶42] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 18th day of January, 2011, to: Richard Edinger at edingerlaw@cablone.net.

Birch P. Burdick