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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

In the Interest of L.D.M.

)
)
) Supreme Court No. 20110110
)
)
) District Court No. 40-04-R-19
)

APPEAL FROM ADDENDUM TO FINDINGS OF FACT ISSUED APRIL 20, 2010
(Addendum dated March 23, 2011)

NORTHEAST JUDICIAL DISTRICT

THE HONORABLE LAURIE A. FONTAINE PRESIDING

BRIEF OF APPELLANT

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STATE OF NORTH DAKOTA

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I. ATTORNEY'S COMPLIANCE WITH RULE 3.1,

NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Larry has the right to appeal from an order denying a petition for discharge, and he has the right to counsel. N.D.C.C. §25-03.3-19. ("Larry" is a pseudonym, not the Appellant's legal name). After review of the transcripts and applicable law, and after further research of possible appealable issues, appellant's attorney does not believe that the record reflects issues with merit for appeal. State v. Robertson, 502 NW2d 249, 250 (N.D. 1993). Nonetheless, Larry asks the Court to address his appeal independent of counsel's conclusions.

II. ISSUES

1. The district court finding that Larry has serious difficulty controlling his behavior is clearly erroneous.
2. Larry's handwritten Statement of Facts and Brief on Supporting Caselaw (Appendix 13 & 37) demonstrate that the treatment requirements of the North Dakota State Hospital violate Larry's Fifth Amendment rights.
3. Larry's treatment at the North Dakota State Hospital is not in accordance with his patient rights as provided in N.D.C.C. §25-03.1-40.
4. Larry's handwritten Statement of Facts and Brief on Supporting Caselaw (Appendix 13 & 37) demonstrate that Larry is not a "sexually dangerous" individual as defined by N.D.C.C. 25-03.3-01 and Larry therefore should not continue to be confined at the North Dakota State Hospital.

III. STATEMENT OF THE CASE

This is an appeal from the Addendum to Findings of Fact Issued April 20, 2010. The Addendum to Findings of Fact were entered by the court on March 23, 2011 and refer to the Order Denying Discharge which was entered by the court on April 20, 2010.

Larry appealed the April 20, 2010 Order Denying Discharge in In Re: L.D.M., 2011 ND 25, 793 N.W.2d 778. In the prior appeal, the North Dakota Supreme Court remanded the case for "preparation of sufficient findings of fact on the record made at the March 23, 2010, discharge hearing." 2011 ND 25 ¶8, 793 N.W.2d 778. No further hearings were held, and no further evidence was offered, to the court between the prior appeal and the court's entry of the Addendum to Findings of Fact Issued April 20, 2010.

The April 20, 2010 Order Denying Discharge found that Larry remained a sexually dangerous individual likely to engage in further predatory acts, and continued Larry's commitment after his annual discharge hearing. The Addendum to Findings of Fact were "in addition to any Findings of Fact, Conclusions of Law, and Orders already issued on April 20, 2010." Appendix 4. While the Addendum to Findings of Fact contained specific references to evidence presented at the March 23, 2010 discharge hearing, the Addendum ordered that the Order Denying Discharge dated April 20, 2010, (Appendix 8 - 10, Order Denying Discharge) remain in place and that Larry remained confined as a sexually dangerous individual. Appendix 7.

On November 5, 2004, Larry was found to be a sexually dangerous individual and was "committed to the care, custody and control of the executive director of the department of human services. . . ." Register of Actions # 27, (Order for Civil Commitment, page 2). Larry requested an annual review as permitted by N.D.C.C. §25-03.3-18. Register of Actions # 91.

On February 27, 2009, Dr. Lynne Sullivan, a licensed forensic psychologist at the North Dakota State Hospital completed an SDI Annual Re-evaluation of Larry. Tr. 3 & 8. Dr. Sullivan recommended that the court find that Larry was "likely to engage in future acts of sexually predatory conduct and to be returned to the . . . Department of Human Services. Tr. 46-7. An independent evaluation of Larry was completed by Dr. Stacey Benson, a licensed psychologist, on October 4, 2009. Tr. 84-6 & 108. Dr. Benson determined that Larry was an individual 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 [him] likely to engage in further acts of predatory conduct." Tr. 138-39.

During the March 23, 2010 Discharge Hearing, Larry testified and Respondent's Exhibit 2, a Written Statement of Factual Support and Respondent's Exhibit 3, a Brief on Supporting Case Law were admitted. Tr. 153. Appendix 13 & 37. Larry had prepared the Written Statement of Factual Support and Brief on Supporting Case Law himself, Tr. 142-3, and Larry wanted the court to consider these documents prior to making its decision. Tr. 146 &

150-51. The court indicated that it would read both Respondent's Exhibit 2 and 3 prior to making its decision. Tr. 153. In its Order Denying Discharge dated April 20, 2010, the court found that Larry continues to remain a sexually dangerous offender who is likely to engage in further predatory acts, and continued Larry's commitment to the Department of Human Services for treatment. Appendix 9-10. In its Order Denying Discharge the court did note that although some of the arguments contained in Larry's Written Statement of Factual Support and Brief on Supporting Case Law were "interesting," that none of them "prevail at this time." Appendix 9. The court did not address Larry's Written Statement of Factual Support and Brief on Supporting Case Law in the Addendum to Findings of Fact.

IV. STATEMENT OF FACTS

On November 5, 2004, Larry was found to be a sexually dangerous individual and was "committed to the care, custody and control of the executive director of the department of human services. . . ." Register of Actions # 27, (Order for Civil Commitment, page 2). Larry requested an annual review as permitted by N.D.C.C. §25-03.3-18. Register of Actions # 91.

On March 23, 2010, a Discharge Hearing was held before the Honorable Laurie A. Fontaine. Dr. Lynne Sullivan, a licensed forensic psychologist at the North Dakota State Hospital, had completed an SDI Annual Re-evaluation of Larry on February 27, 2009. Tr. 3 & 8. Dr. Sullivan testified that 1993 was the last time that Larry had been charged with a sexual offense. Tr. 56. Dr.

Sullivan agreed that Larry does not present with a sexual disorder. Tr. 20-21.

Instead, Dr. Sullivan testified that Larry has been diagnosed with anti-social personality disorder with borderline features. Tr. 13.

Dr. Sullivan testified that the North Dakota State Hospital has been providing Larry with sex offender treatment, but that the current sex offender treatment program at the North Dakota State Hospital does not allow Larry the opportunity to successfully complete treatment without Larry admitting responsibility for the underlying Gross Sexual Imposition conviction. Tr. 57. Dr. Sullivan further testified that less restrictive treatment is available at the North Dakota State Hospital. Tr. 50.

Dr. Sullivan testified that "Larry continues to demonstrate the behavior that he demonstrated while in the community when he was sexually offending against others and intruding on their persons." Tr. 43. Dr. Sullivan did indicate that Larry has difficulty controlling his behavior "with regard to his anger and property destruction," and that on two occasions this has resulted in criminal sanctions and incarceration at the North Dakota State Penitentiary. Tr. 44. Dr. Sullivan recommended that the court find that Larry was "likely to engage in future acts of sexually predatory conduct and to be returned to the . . . Department of Human Services. Tr. 46-7.

Dr. Stacey Benson, a licensed psychologist, completed an independent evaluation of Larry on October 4, 2009. Tr. 84-6 & 108. Dr. Benson testified that Larry does not present with a sexual disorder. Tr. 97. Instead, Dr. Benson

diagnosed Larry as having anti-social personality disorder with borderline features and narcissism, but the borderline features and narcissism do not rise to the level of a personality disorder. Tr. 97. Other than Larry's anti-social personality disorder, Dr. Benson did not find that Larry exhibits any other personality disorder or dysfunction. Tr. 98.

Dr. Benson determined that Larry was an individual 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 [him] likely to engage in further acts of predatory conduct." Tr. 138-39. Dr. Benson agreed that Larry "has shown that he has difficulty controlling his behavior at this time." Tr. 135.

Dr. Benson testified that the treatment for anti-social personality disorder "is based on trying to alter somebody's behavior." Tr. 98. Dr. Benson further testified that anti-social personality disorder can be treated outside of sex offender treatment, and that Larry could be treated for anti-social personality disorder without treating him in a sexual offender treatment program. Tr. 99.

Dr. Benson testified that if Larry were to receive anger management treatment, the anger management treatment could have a positive effect on Larry's behavior and result in Larry behaving in a more "pro-social" manner. Tr. 109-110.

Larry also testified on his own behalf. Larry knows that his commitment stems from his conviction, after a jury trial. Tr. 143. However, Larry continues to

maintain his innocence for that crime. Tr. 144-45. Larry believes that the Fifth Amendment protections offered a defendant in an criminal case apply to his civil commitment as a sexually dangerous individual. Tr. 146-47. Larry contends that his conduct does not meet the legal definition of "sexually predatory conduct." Tr. 151-52.

Larry had prepared a Written Statement of Factual Support and a Brief on Supporting Case Law which were admitted as Respondent's Exhibits 2 and 3. Tr. 142-43 & 153. Appendix 13 & 37. Larry wanted the court to consider these documents prior to making its decision. Tr. 146 & 150-51. The court indicated that it would read both Respondent's Exhibit 2 and 3 prior to making its decision. Tr. 153. In its Order Denying Discharge dated April 20, 2010, the court noted that although some of the arguments contained in Larry's Written Statement of Factual Support and Brief on Supporting Case Law were "interesting," that none of them "prevail at this time." Appendix 9. However, the court did not address Larry's Written Statement of Factual Support and Brief on Supporting Case Law in the Addendum to Findings of Fact.

V. LAW AND ARGUMENT

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 Court reviews "civil commitments of sexually dangerous individuals under a modified clearly erroneous standard." Matter of A.M., 2010 ND 163 ¶ 14. The Court "'will affirm the district court's decision unless

the court's order is induced by an erroneous view of the law, or we are convinced the order is not supported by clear and convincing evidence.'" Id. (quoting In re R.A.S., 2008 ND 185 ¶5, 756 N.W.2d 771).

1. The district court finding that Larry has serious difficulty controlling his behavior is clearly erroneous.

Before an individual may be committed as a 'sexually dangerous individual,' the State must prove by clear and convincing evidence (1) the 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 condition makes the 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. Matter of Voisine, 2010 ND 17 ¶9, 777 N.W.2d 908 (citing N.D.C.C. §§25-03.3-01(8), 25-03.3-13). In addition, as a result of substantive due process concerns, the State must also demonstrate by clear and convincing evidence that the individual has serious difficulty controlling his behavior. Voisine, at ¶9 (citing In re E.W.F., 2008 ND 130 ¶10, 751 N.W.2d 686; Kansas v. Crane, 534 U.S. 407, 413 (2002)).

Matter of A.M., 2010 ND 163 ¶13.

The court found that "[b]oth experts testified [Larry] had and would have

difficulty controlling his behavior and impulses." Appendix 5. Proof that an individual has serious difficulty controlling his behavior "is necessary 'to distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal sense.'" Matter of A.M., at ¶22 (quoting Interest of J.M., 2006 ND 96 ¶10, 713 N.W.2d 518). Dr. Sullivan testified that "Larry continues to demonstrate the behavior that he demonstrated while in the community when he was sexually offending against others and intruding on their persons." Tr. 43. However, Dr. Sullivan did not specify or identify any "sexual act," "sexual contact," or "sexually predatory conduct" as defined by N.D.C.C. §25-03.3-01(6, 7 & 9) that Larry has demonstrated since he has been civilly confined. See, Tr. 43-44. In fact, Dr. Sullivan testified that 1993 was the last time that Larry had been charged with a sexual offense. Tr. 56. Dr. Sullivan did indicate that Larry has difficulty controlling his behavior "with regard to his anger and property destruction," and that on two occasions this has resulted in criminal sanctions and incarceration at the North Dakota State Penitentiary. Tr. 44. However, while Larry's purported anger and property destruction are indicative of "typical [recidivism] in the ordinary criminal sense," such behavior does not constitute sexual acts, sexual contact, or sexually predatory conduct which require Larry's continued civil commitment as a dangerous sexual offender.

In Matter of G.R.H., 2006 ND 56, 711 N.W.2d 587 the Court analyzed Kansas v. Hendricks, 521 U.S. 346 (1997) and Kansas v. Crane, 534 U.S. 407

(2002), and the Court's analysis of these two United States Supreme Court cases is relied upon here. In Matter of G.R.H., the Court reiterated that "lack of control for civil commitment purposes mean[s] there must be proof of serious difficulty in controlling behavior, which must be sufficient to distinguish the dangerous sexual offender, whose serious mental illness, abnormality, or disorder subjects him to civil commitment, from the dangerous but typical recidivist convicted in the ordinary criminal sense." Matter of G.R.H., 2006 ND 56 ¶12, 711 N.W.2d 587 (citing Kansas v. Crane, 534 U.S. 407, 412 (2002)). This distinguishment is "constitutionally necessary, otherwise 'civil commitment' could quickly become a 'mechanism for retribution or general deterrence' - functions properly those of criminal law, not civil commitment." Matter of G.R.H., 2006 ND 56 ¶49, 711 N.W.2d 587 (Kapsner, J. dissenting) (quoting Kansas v. Crane, 534 U.S. 407, 412 (2002) and citing Kansas v. Hendricks, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)). Succinctly put, Crane and Hendricks "require 'proof of serious difficulty in controlling behavior,'" Matter of G.R.H., 2006 ND 56 ¶13, 711 N.W.2d 587 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002) and See, Hendricks, 521 U.S. at 358), and proof that Larry has "serious difficulty in controlling [his] behavior" is lacking here.

Dr. Benson agreed that Larry "has shown that he has difficulty controlling his behavior at this time." Tr. 135 (emphasis added). However, "[t]he necessary evidence must show the individual is a danger to public health and safety because the person is likely to engage in sexually violent conduct in

the future if not incapacitated.” Matter of G.R.H., 2006 ND 56 ¶51, 711 N.W.2d 587 (Kapsner, J., dissenting) (citing Kansas v. Hendricks, 521 U.S. 346, 357 (1997)) (emphasis added). No evidence was introduced that clearly showed Larry would have difficulty controlling his behavior in the future. Even if the Court were to determine that evidence was introduced which shows that Larry would have difficulty controlling his behavior in the future, any such evidence would show that Larry has minimal difficulty controlling his behavior, and not serious difficulty that would make him likely to engage in sexually violent conduct as is required in order to continue Larry’s civil confinement.

2. Larry’s handwritten Statement of Facts and Brief on Supporting Caselaw (Appendix 9 & 33) demonstrate that the treatment requirements of the North Dakota State Hospital violate Larry’s Fifth Amendment rights.

“[A] claimed violation of a constitutional right is de novo.” State v. Keyes, 2000 ND 83 ¶2, 609 N.W.2d 428.

The Fifth Amendment to the United States Constitution prevents the state from compelling Larry to be a witness against himself, and Larry believes that the Fifth Amendment protections offered a defendant in an criminal case apply to the civil commitment of a sexually dangerous individual. Tr. 146-47. Larry’s commitment stems from his conviction, after a jury trial, for Gross Sexual Imposition. Register of Actions 1, page 3 of 7; Tr. 143. Larry continues to maintain his innocence for that crime. Tr. 144-45. The current sex offender treatment program at the North Dakota State Hospital does not allow Larry the

opportunity to successfully complete treatment without Larry admitting responsibility for the underlying Gross Sexual Imposition conviction. Tr. 57 & 100. Therefore, since the Fifth Amendment protects Larry from being a witness against himself and guarantees Larry the right to profess his innocence, Larry believes that his continued civil commitment violates his Fifth Amendment rights and constitutes an unconstitutional punishment because his continued civil commitment results from his refusal to accept responsibility for, and admit to having committed, the crime which the jury convicted him of. Tr. 100-101 & 146-48. Accordingly, since Larry is civilly committed and cannot successfully complete treatment without admitting the underlying offense, Larry believes he should be released from civil confinement. Tr. 159. Larry relies upon his handwritten Statement of Facts and Brief on Supporting Caselaw, Appendix 13 & 37, and the cases cited therein, and particularly upon McMorrow v. Little, 103 F.3d 432 (8th Cir. 1997) in support of this argument.

3. Larry's treatment at the North Dakota State Hospital is not in accordance with his patient rights as provided in N.D.C.C. §25-03.1-40.

Under 25-03.3-23, as long as a committed individual is placed at and resides at a treatment facility, that committed individual has the same rights as other residents of the facility. N.D.C.C. §25-03.3-23. North Dakota Century Code section 25-03.1-40 gives each patient of a treatment facility the following rights:

1. To receive appropriate treatment for mental and physical

ailments. . . .

2. To the least restrictive conditions necessary to achieve the purposes of treatment.

4. To be free from unnecessary restraint and isolation.

11. To exercise all civil rights

N.D.C.C. §25-03.1-40(1, 2, 4 & 11).

Both Dr. Sullivan and Dr. Benson agree that Larry does not present with a sexual disorder. Tr. 20-21 & 97. Instead, Larry has been diagnosed with anti-social personality disorder with borderline features and narcissism, but the borderline features and narcissism do not rise to the level of a personality disorder. Id. 13 & 97. Other than Larry's anti-social personality disorder, Larry does not exhibit any other personality disorder or dysfunction. Id. 98. The treatment for anti-social personality disorder "is based on trying to alter somebody's behavior," Tr. 98, and anti-social personality disorder can be treated outside of sex offender treatment. Tr. 99. Larry could be treated for anti-social personality disorder without treating him in a sexual offender treatment program. Id. Further, if Larry were to receive anger management treatment, the anger management treatment could have a positive effect on Larry's behavior and result in Larry behaving in a more "pro-social" manner. Tr. 109-110.

The North Dakota State Hospital is not taking this treatment approach with Larry. Instead, the North Dakota State Hospital has been providing Larry

with sex offender treatment. Tr. 13. However, the North Dakota State Hospital does have a less restrictive treatment program. Tr. 50. Larry is entitled to receive the appropriate, least restrictive treatment available. N.D.C.C. 25-03.1-40 (1 & 2). Therefore, if the Court continues Larry's civil commitment, the Court should order that the North Dakota State Hospital provide Larry with anger management treatment and with treatment for anti-social personality disorder instead of sex offender treatment.

Larry's situation is different from that which the Court decided in Matter of G.R.H., 2006 ND 56, 711 N.W.2d 587. In Matter of G.R.H., the Court was asked to judicially determine alternatives for treatment of G.R.H. Id. at ¶21-22. Larry is not asking the Court to determine alternatives to sexual offender treatment. Rather, Larry is asking that the Court order the executive director of the Department of Human Services to provide Larry with the appropriate treatment for anti-social personality disorder instead of sex offender treatment. Both Dr. Sullivan and Dr. Benson agree that Larry does not present with a sexual disorder, Tr. 20-21 & 97, yet the North Dakota State Hospital is providing Larry sex offender treatment. Tr. 13. Treatment for anti-social personality disorder is different from sex offender treatment, Tr. 98-99, more appropriate and less restrictive treatment is apparently available at the North Dakota State Hospital, Tr. 50, and providing Larry with treatment for anti-social personality disorder and with anger management treatment could have a positive effect on Larry's behavior and result in Larry behaving in a more "pro-social" manner. Tr. 109-

110.

4. Larry's handwritten Statement of Facts and Brief on Supporting Caselaw (Appendix 13 & 37) demonstrate that Larry is not a "sexually dangerous" individual as defined by N.D.C.C. 25-03.3-01 and Larry therefore should not continue to be confined at the North Dakota State Hospital.

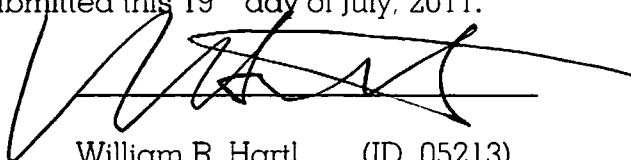
Larry contends that his conduct does not meet the legal definition of "sexually predatory conduct." Tr. 151-52. "Sexually predatory conduct" is defined in N.D.C.C. §25-03.3-01(9). Larry advances the proposition that simply because a person has an anti-social personality disorder does not require the continued civil commitment of that person. Appendix 22. Larry also maintains that no qualified expert has ever shown that he has an anti-social personality disorder which would cause Larry to commit "sexually violent acts" towards women or which makes Larry a dangerous person. Id. Accordingly, Larry sees no nexus between his alleged anti-social personality disorder and his propensity, or rather, lack thereof, to become angry or enraged and commit violent sexual acts. Id. Therefore, since Larry does not suffer from a "severe mental abnormality" that would cause him to commit violent sexual acts, and since Larry believes he has shown that he can control his anti-social personality disorder and his behavior towards women, Tr. 150-52, Larry is not a "sexually dangerous individual" as that term is defined by N.D.C.C. 25-03.3-01(8) and as that term is used within N.D.C.C. Chapter 25-03.3. Accordingly, Larry believes his civil commitment should not continue.

VI. CONCLUSION

The evidence presented at the review hearing does not clearly and convincingly show that Larry has serious difficulty controlling his behavior that would cause him to engage in sexually violent conduct in the future. The evidence did clearly show that Larry cannot successfully complete sex offender treatment without admitting the underlying offense and Larry vehemently professes his innocence. Accordingly, Larry should not continue to be civilly committed.

If the Court does continue Larry's civil commitment, the Court should order the executive director of the North Dakota Department of Human Services to provide Larry with anger management treatment and with treatment for anti-social personality disorder, rather than sex offender treatment.

Respectfully submitted this 19th day of July, 2011.



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