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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Barbara Whelan,	)	
	)	
Petitioner- Appellee,	)	**Supreme Court No.: 20110302**
	)	**District Court No.: 50-03-R-89**
vs.	)	
	)	
	)	
C. S.,	)	
	)	
Respondent-Appellant.	)	

APPEAL FROM DISTRICT COURT DECISION
DENYING DISCHARGE OF APPELLANT

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Jurisdiction in this matter is pursuant to N.D. Cent. Code § 25-03.3-19. The Walsh County District Court denied Mr. S.'s September 24, 2010, Petition for Discharge on September 13, 2011. Mr. S. timely filed this appeal on October 11, 2011.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in determining that the State establishing by clear and convincing evidence that Mr. S has serious difficulty in controlling his behavior.

II. Whether Mr. S. is a sexually dangerous individual pursuant to N.D.C.C. § 25-03.3-01(8) that warrants continuing civil commitment.

STATEMENT OF THE CASE

[¶ 1] On March 5, 2004, Mr. S. was committed as a sexually dangerous individual, and placed into the care, custody, and control of the Executive Director of the North Dakota Department of Human Services (NDDHS) pursuant to N.D.C.C. § 25-03.3. Findings of Facts ¶1 (FF). On September 24, 2010, Mr. S., requested a discharge hearing under N.D.C.C. § 25-03.3-18(2). Id. The hearing for discharge was held on July 6, 2011, before the Honorable M. Richard Geiger, Judge of the District Court. Id. The District Court denied Mr. S.'s request for discharge, determining the State had established by clear and convincing evidence Mr. S. remained a sexually dangerous individual as defined under N.D.C.C. § 25-03.3-01(8). (Id. at 10). Mr. S. appeals the decision of the District Court.

STATEMENT OF THE FACTS

[¶ 2] In 2000, at 16 years old, Mr. S. was adjudicated of Gross Sexual Imposition for stealing girls' underwear from school. (Benson SDI 17). He was placed on probation in Walsh County for 12 months. Id. In 2001, at age 17, Mr. S. was adjudicated of three counts of Sexual Assault, and was placed with the North Dakota Youth Correctional Center (NDYCC). (Id. at 15). He was later charged with two counts of Sexual Assault at NDYCC. Those charges were dismissed. Id.

[¶ 3] In 2004, at age 20, Mr. S. was committed to the care, custody, and control of the Executive Director of the NDDHS. (FF ¶1). Mr. S. waived his right to request a discharge hearing on January 5, 2005, December 20, 2005, and February 8, 2007. Id. In February 2008, Mr. S. requested a discharge hearing, but withdrew that request after an evaluation by an independent examiner. (FF ¶2). Mr. S. requested another discharge hearing on June 26, 2009, which resulted in an order directing his continued custody with the NDDHS. (Id.). On September 4, 2010, Mr. S. requested another discharge hearing, which was held on July 6, 2011, and is the subject of this appeal. (FF ¶3).

[¶ 4] Expert witnesses Robert D. Lisota, Ph.D. (hereinafter Dr. Lisota) and Stacey Benson Psy.D., LP. (hereinafter Dr. Benson) testified at the hearing on July 6, 2011. (FF ¶4). Dr. Lisota diagnosed Mr. S. with pedophilia and antisocial personality disorder. (Tr. 4-5). He stated Mr. S. is likely to engage in further acts of sexually-predatory conduct, and based this opinion on Mr. S.'s history of juvenile misconduct. (Tr. 8-9). Dr. Lisota believes Mr. S. is unable to control his behavior because he did

not use the skills he learned in treatment to handle his emotions in regards to a consensual relationship he had with another resident. (Tr. 16).

[¶ 5] Dr. Benson has also diagnosed Mr. S. with pedophilia. However, her diagnosis was based on his juvenile history. Dr. Benson noted Mr. S's behavior over the last seven years has not met the criteria for this disorder. (Benson SDI 31). She also stated there is no conclusive evidence Mr. S. would reoffend. (Tr. 53). In fact, Dr. Benson stated Mr. S.'s attempt at an age-appropriate, consensual, relationship should not be viewed as an "indiscriminate sexual acting out," but rather as an adult attempting to reach out to another adult in a caring manner. (Tr. 52). There are no tests available to determine if an adult who offended as a juvenile would offend again as an adult. (Tr. 53). Specifically, since the brain is not fully mature until the early twenties, "there is extreme difficulty in trying to look at who somebody was and what they did as an adolescent and argue that that behavior can be reliably assessed to continue into adulthood." (Tr. 22, 56-57). Furthermore, **the recidivism rate for adults who offended as a juvenile is seven percent.** (Tr. 54) (Emphasis added). Dr. Benson testified Mr. S. has shown a lot of progress in the treatment program, and there is evidence Mr. S can control his behavior. (Tr. 51). In Dr. Benson's opinion, Mr. S. does not meet the criteria of a sexually-dangerous individual. (Tr. 62).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DETERMINED MR. S. HAD A SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR.

[¶ 6] Civil commitments of sexually dangerous individuals are reviewed under a "modified clearly erroneous standard." In re Midgett, 2007 ND 198, ¶ 6, 742 N.W.2d 803, 805. The Supreme Court will affirm the District Court's decision unless the "order is induced by an erroneous view of the law, or [it is] firmly convinced the order is not supported by clear and convincing evidence." Id. (quoting In re Anderson, 2007 ND 50, ¶ 21, 730 N.W.2d 570). In this case, the District Court erroneously concluded Mr. S. was a sexually dangerous individual because he does not exhibit a serious disability in controlling his behavior as shown to be necessary for civil commitment by Kansas v. Crane, 534 U.S. 407, 413 (2002).

[¶ 7] In Crane, the United States Supreme Court held the Federal Constitution does not permit commitment of a dangerous sexual offender without any lack-of-control determination. Id. This Court in In re Hehn, stated "in addition to the three requirements contained in the plain language of the statute and this Court's definition of 'likely to engage in further acts of sexually predatory conduct,' the United States Supreme Court held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior." In Re Hehn, 2008 ND 36, ¶ 19, 745 N.W.2d 631.

[¶ 8] The District Court held the State had established by clear and convincing evidence Mr. S. has serious difficulty controlling his behavior. (FF ¶13). The court based its opinion on testimony that Mr. S. has had numerous write-ups for not

following the rules. (Id.) However, the write ups were not for sexually deviant behavior, rather they were for watching television later than allowed, possessing movies which starred pre-teen or teenage actresses, and having a consensual, age-appropriate relationship with another resident. (FF ¶13). Dr. Benson testified "[i]f this same behavior had occurred in the community, it would not be considered deviant in any fashion." (Tr. 53) (Emphasis added). In addition, the court relied on testimony that Mr. S. had sexual fantasies about his prior victims. However, Dr. Lisota testified there was only one incident in which Mr. S. had a sexual fantasy about one of his victims, and that was over two years ago. (Tr. 26-27). Both doctors testified Mr. S.'s behavior had progressed, and the fact he has controlled the underage sexual fantasies proves he has the ability to control his behavior. (Tr. 34-37, 51-52).

[¶ 9] N.D.C.C. § 25-03.3-01 does not establish what constitutes a failure to control one's behavior. In In re G.R.H., this Court found that admitted sexual contact with girls aged 13 and 14 when he was 18; 17 when he was 24; 13, 14, 16 and two 17 when he was 25; and 16 when G.R.H. was 27 after he was released from prison indicates a serious difficulty of controlling behavior. In re G.R.H., 2008 ND 222, ¶ 8, WL 5220988. Further, G.R.H. spent over $4,000 placing sex-lines calls and engaged in sexual contact with his girlfriends while in the State Hospital. Id.

[¶ 10] In this case, Mr. S. has not demonstrated a similar severe lack of control required to deny a petition for discharge. Mr. S. watched television later than allowed, watched movies starring pre-teen and teenage actresses, and engaged in a consensual age-appropriate relationship with another resident. (Tr. 81, 65-66). There

has been no unwanted physical contact with another resident since Mr. S. has been at the State Hospital. (Tr. 52).

[¶ 11] Dr. Benson testified Mr. S.'s behavior does not necessarily show "an inability to control" his behavior. (Tr. 68). Because there are no "tests" available for adult's like Mr. S., self-report is the only reliable method to determine control. (Tr. 68). Mr. S. has reported a great decrease in both fantasies and masturbation. (Tr. 68). In addition, Dr. Benson testified it is perfectly normal for Mr. S. to have natural sexual needs, and his only outlet is masturbation. (Tr. 81-82). Mr. S. has been "caught" masturbating in his room, but there is an assumption of privacy in one's own room. Dr. Benson would not classify this incident as inappropriate sexual behavior. (Tr. 82). Further, Mr. S. has not engaged in any inappropriate sexual contact while in the State Hospital. (Tr. 82). Mr. S. has admitted to fantasizing, in the past, about young females, but there is nothing to indicate he would act on those fantasies at the present time or in the future. (Tr. 83-84).

[¶ 12] The evidence the District Court relies on for its determination does not support a finding that Mr. S. has serious difficulty controlling his behavior. Both doctors have testified Mr. S. has progressed in his therapy. Mr. S. had not fantasized about a victim in two years and currently exhibits normal sexual desires and behaviors for other adults. The State has failed to prove by clear and convincing evidence Mr. S. is unable to control his behavior and actions in regard to sexual deviancy.

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED MR. S. IS A SEXUALLY DANGEROUS INDIVIDUAL PURSUANT TO N.D.C.C. § 25-03.3-01(8) THAT WARRANTS CONTINUING CIVIL COMMITMENT.

[¶ 13] The State has failed to prove by clear and convincing evidence Mr. S. will engage in further acts of a sexually predatory nature; and therefore, has not proven Mr. S. to be a sexually dangerous individual as required under N.D.C.C. § 25-03.3-01(8). A sexually dangerous individual is someone who has "engaged in sexually predatory conduct . . . and has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder . . . that makes that individual likely to engage in further acts of sexually predatory conduct . . . ." N.D.C.C. § 25-03.3-01(8). It is undisputed Mr. S. falls within the first two prongs of this requirement. Mr. S disputes the finding he will engage in future acts of similar conduct.

[¶ 14] Under North Dakota law, a person is "likely to engage in further acts of sexually predatory conduct" if the individual's propensity towards sexual violence is of such a degree as to pose a threat to others. In re M.B.K., 2002 ND 25, ¶ 18, 639 N.W.2d 473. Mr. S. does not have a history of sexual violence toward others. (Benson SDI, 18). He did not threaten his victims and he did not physically force his victims into sexual activity with him. Id. Mr. S's sexual relationship, while at the State Hospital, was consensual, and age-appropriate. (Tr. 52).

[¶ 15] The District Court held Mr. S. was a sexually dangerous individual and should continue to be civilly committed for treatment purposes. The court relied upon the testimony of Dr. Lisota and Dr. Benson, who both diagnosed Mr. S. with pedophilia and antisocial personality disorder. (Lisota SDI, 6; Benson SDI 28-29).

Actuarial tests are unavailable for someone like Mr. S., and experts have instead turned to past experience and self-report. (Tr. 10, 23, 68). Dr. Lisota testified Mr. S. is likely to reoffend and is a danger to the community, if released. (Tr. 10). Dr. Benson, on the other hand, testified Mr. S. is unlikely to reoffend and is not a danger if released into the community. (Tr. 58).

[¶ 16] According to Dr. Lisota, Mr. S. was likely to reoffend because his past behavior is an indication of future behavior. (Tr. 9). Dr. Lisota based his opinion on Mr. S.'s progression in the treatment program, and Mr. S.'s personal relationship with another resident. (Tr. 10, 15-16). Mr. S.'s progression in treatment has been slow, bouncing between basic Skills Level 1 and Stage 1. (Tr. 10). However, Dr. Lisota testified the treatment process is dynamic, and it is common for patients to experience the Ping-Pong effect. (Tr. 34-35). Mr. S. engaged in a personal relationship with another resident, but this relationship was consensual, and age-appropriate. (Tr. 31). Dr. Lisota testified the relationship was inappropriate because patients in a sexual offender program are not allowed to engage in sexual contact with others. (Tr. 31). However, Dr. Benson testified the personal contact shows Mr. S.'s progression in the program, because he was reaching out to another person, attempting to experience an adult, caring relationship. (Tr. 52). Dr. Lisota further claimed Mr. S. is not progressing in treatment, but regressing because Mr. S. chose to demote himself rather than deal with his feelings for the resident after the relationship ended. (Tr. 15). Mr. S.'s feelings during his time of grief are not uncommon for individuals in the community. It was Mr. S.'s individual way of dealing with his grief and has no bearing on whether Mr. S. will engage in future acts of sexually predatory conduct.

[¶ 17] Dr. Benson testified Mr. S. is not a sexually dangerous individual because he has shown signs of progression in treatment and attempted to have an adult relationship with another resident. More importantly, it was impossible to predict future behavior of an adult who committed deviant acts as a juvenile. (Tr. 44-63). Dr. Benson used the ABEL Assessment of Sexual Interests test to determine how well Mr. S. was progressing in treatment. (Tr. 49). The test results of Mr. S. showed marked improvement – "no sexual interest in males, and sexual interest in young females." (Tr. 49). Mr. S. has also demonstrated a decrease in masturbation, and his impulsive behavior is under control. (Tr. 51). The problems Mr. S. still faces are not of a sexual nature. (Tr. 51). Dr. Benson testified Mr. S.'s personal relationship was not an "indiscriminate sexual acting out," but instead found Mr. S. was expressing his feelings for another person. (Tr. 52). Mr. S.'s relationship was against the rules of the program, but in the community, it would be a healthy, normal relationship in the community. This demonstrates that Mr. S. has progressed enough in treatment by attempting a consensual, age-appropriate relationship with an adult partner. (Tr. 52).

[¶ 18] Dr. Benson further testified it would be impossible to determine Mr. S.'s risk of reoffending because he committed the sexual assault when he was a juvenile, and is now being assessed as an adult. (Tr. 53). When juveniles are first assessed, the results are only valid for six months because the risk does not continue with juveniles as it does with adults. (Tr. 54). The risk can change with any major life change in the juvenile's life. (Tr. 54). Dr. Benson testified the results of Mr. S.'s

assessment at age 20 cannot be used to determine his risk of reoffending as an adult, seven years later. (Tr. 54).

[¶ 19] There are several factors which make it difficult to reassess an adult who offended as a juvenile. (Id.). "Research with juvenile offenders has consistently shown their risk to re-offend is around seven percent." (Id.). This percentage is low with or without the juvenile receiving treatment. (Id.). Dr. Benson testified it is difficult to assess something with such a low base rate, something that happens so infrequently. (Id.). Another issue is that the risk factors are different for adults than for juveniles. (Id.). Juveniles are more likely to take risks and do not weigh consequences the way an adult weighs consequences. (Id.). Further, a person's character stabilizes with age, so "who somebody is at age 16 is not necessarily who they are going to be at age 26." (Id.). Criminal behavior decreases significantly around age 18 or 19, so it is almost impossible to argue an adolescent would act the same way as he or she would as an adult. (Id.).

[¶ 20] Dr. Benson based some of her testimony on the information derived from the 2010 Annual Convention of the American Psychological Association. (Tr. 59). There are biological differences between the adolescent brain and the adult brain. *See generally Juvenile Offenders Are Ineligible for Civil Commitment as Sexual Predators*, Am. Psych. Ass'n 118th Ann.Conv. (2010) (hereinafter, JOSO).

[¶ 21] First, "pruning" is a function of the brain that decreases the amount of gray matter, which leads to a more mature brain, strengthening its "ability to reason and consistently exercise good judgment." (JOSO p. 7). The frontal lobe, which controls judgment, does not mature until a person has reached age 21 or 22. (Id. at 8).

Second, the process of myelination occurs "well into late adolescence and early adulthood," and the "prefrontal cortex is among the last regions of the brain to mature. . . ." (Id.). Myelination enhances a person's ability to respond, plan ahead, and weigh risks. (Id.). Therefore, a person is not biologically mature until age 21 or 22. (Id.).

[¶ 22] The brain consists of different regions or networks that serve different functions. (Id.). Two important regions are the "socioemotional network" (an area that processes rewards) and the "cognitive control network" (an area that directs thoughts and actions). (Id.). During the pruning and myelination processes the "inter-cortical" and "cortical-subcortical" connections mature, but the process is slow. (Id. at 9). During this slow process, the adolescent is vulnerable to risk taking "because the onset of these changes takes place rapidly while the cognitive control network is still immature and developing at a gradual pace." (Id.). However, adults are not susceptible or vulnerable to risk taking because the cognitive control network has fully matured. (Id.).

[¶ 23] Mr. S.'s brain was not fully mature when he committed the offenses. Also, it was possible Mr. S.'s brain was not at the same maturity as adolescents his own age. According to Mr. S.'s medical history, Mr. S. was prescribed psychotropic medications as early as age 3 and was continually medicated throughout his young life. (Benson SDI 11). At age 9, Mr. S. was "having deficits consistent with frontal lobe injury," the part of the brain that controls decision making and problem solving. (Id.). Assessments by Dr. Sternhagen, at age 14, showed Mr. S. had an IQ of 83 (below the average of 100, but higher than "mild mental retardation" at 70). (Id. at

10). Sexual arousal peaks during early adolescence. During this time, Mr. S. was exposed to pornographic movies, magazines, and internet pornography. (Id. at 15; *see also* JOSO at 9). For these reasons, Mr. S. was not only susceptible to inappropriate actions from a biological standpoint, but also from an environmental standpoint as well.

[¶ 24] The United States Supreme Court has recently addressed the issue of whether juveniles should be held to the same culpability as adults. The Supreme Court has concluded the answer is no. "Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Graham v. Florida, 130 S.Ct. 2011, 2026 (2010). "For example, parts of the brain involved in behavior control continue to mature through late adolescence." Id. "Juveniles have a 'lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures . . . their characters are not as well formed'" Roper v. Simmons, 543 U.S. 551, 569-70 (2005). The Court recognized that expert psychologists have a difficult time differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573.

[¶ 25] Mr. S. should not be held to the same culpability of a fully matured adult. The Supreme Court has held juveniles "cannot with reliability be classified among the worst offenders." Id. at 569. A juvenile's character traits are in a transitory phase, and the deficiencies can be reformed. Id. A juvenile's crime, no matter how horrible, is not as reprehensible as an adult. Id. Professionals of

Psychiatry have determined it is "virtually impossible for an evaluator to accurately apprehend a juvenile's" risk of reoffending as an adult. (JOSO at 10). Furthermore, the recidivism rate is so low it would be inappropriate to speculate that an adult would reoffend without scientific evidence. (Id. at 12.). The Supreme Court concluded it is unconstitutional to sentence a juvenile to life imprisonment without parole, or death. *See* Graham, 130 S.Ct. 2011; Roper, 543 U.S. 551. The same standard should be applied to situations similar to Mr. S. In essence, the State would have Mr. S. "imprisoned for life," for an offense he committed as a juvenile. Mr. S. is being given treatment as an adult for a crime committed as a juvenile, at a time when his brain was not fully mature. Dr. Benson testified Mr. S. is not receiving the correct medical treatment, and will not improve to the satisfaction of the State. (Tr. 58). For these reasons, the State has sentenced Mr. S. to life in prison, a sentence the Supreme Court has concluded to be unconstitutional.

[¶ 26] The State has not proven by clear and convincing evidence Mr. S. will reoffend, and therefore, is not a sexually dangerous individual. Dr. Lisota used his "clinical judgment" to assess Mr. S. and concluded he was a sexually dangerous individual. Clinical judgment has been proved to be wrong between seventy-two and eighty-six percent of the time. (JOSO at 15). On the other hand, Dr. Benson took into consideration Mr. S.'s age and brain maturity at the time of the offenses, and assessed Mr. S. using a clinically approved test, appropriate for someone like Mr. S. At the time of his offense, the evidence from the clinically approved test showed Mr. S. was no more in control of his behavior as any other juvenile. The ABEL test showed Mr. S. does not have sexual interest in young females or males. Mr. S. should not be

penalized for life, for an offense committed when his brain was immature, and he was not in full control of his actions. Mr. S. should be given credit for his progression in treatment, even though the treatment is not appropriate for him. Mr. S. should be given credit for attempting to engage in an age-appropriate personal, caring relationship. There is no definitive way to predict Mr. S.'s future conduct, and he should not be penalized for mere speculation for future behaviors based upon juvenile behavior. Mr. S.'s request for discharge should be granted.

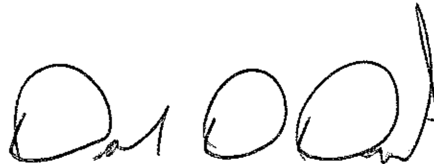
CONCLUSION

[¶ 27] Based on the argument above, the District Court erred in determining that there was clear and convincing evidence that Mr. S. has serious difficulty controlling his behavior and remains a sexually dangerous individual. Testimony, psychology reports, and Supreme Court decisions have all shown a juvenile cannot be held to the same standards as an adult when committing a crime as a juvenile. A juvenile is more susceptible to irresponsible, risk taking behavior. Also, juveniles do not apply good judgment when acting on impulse. Adults do not have the same problems because the brain is fully matured in the 20s. Furthermore, it is inappropriate to determine Mr. S.'s potential to reoffend using clinical judgments because the error rates are far too high. It is very rare for an adult to offend just because he offended as a juvenile. Mr. S. should not be penalized for the lack of scientific tests available to assess his risk factors.

[¶ 28] This Court should not assess Mr. S. using outdated tests, or his history of offenses which occurred when his brain was immature. These methods are not

strong enough predictors of Mr. S.'s risk for future harm. This Court assesses Mr. S. by looking at his progress in treatment and his desire to have an intimate age-appropriate relationship. Mr. S. has not exhibited any conduct that indicates he has issues controlling his behavior and has not demonstrated conduct that is indicative of the behavior people are civilly committed pursuant to N.D.C.C. § 25-03.3-01. Therefore, Mr. S. respectfully requests this Court to reverse the Order of the District Court and allow his discharge.

Dated this 19 day of March, 2012.



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