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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Barbara L. Whelan,	*	
State's Attorney,	*	
Petitioner and Appellee,	*	Sup. Co. No. 20110302
v.	*	Walsh Co. No. 50-03-R-089
C.S.,	*	APPELLEE BRIEF
Respondent and Appellant.	*	

APPEAL FROM ORDER CONTINUING CIVIL COMMITMENT PURSUANT TO §
N.D.C.C. § 25-03.2

DATED SEPTEMBER 13, 2011

FROM THE NORTHEAST JUDICIAL DISTRICT

THE HONORABLE M. RICHARD GEIGER, PRESIDING

Kelley M.R. Cole
Walsh County Assistant State's Attorney
ND Bar No. 06358
Walsh County Courthouse – 3rd Floor
600 Cooper Avenue
Grafton, North Dakota 58237
Telephone: (701) 352-1300
Facsimile: (701) 352-0411
Email: kcole@nd.gov

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STATEMENT OF FACTS

¶1] On July 3, 2001, Mr. S was adjudicated delinquent, having committed the offense of Gross Sexual Imposition involving a 7 year old female child, when Mr. S was 16 years old. (Order for Continuing Commitment (OCC) ¶6). On November 13, 2001, Mr. S was adjudicated delinquent, having committed 2 counts of sexual assault on two juvenile males, when Mr. S was 17 years old. (OCC ¶6). On March 5, 2004, Judge M. Richard Geiger found by clear and convincing evidence that Mr. S was a sexually dangerous individual and ordered Mr. S committed to the care, custody and control of the Executive Director of the North Dakota Department of Human Services (NDDHS). (OCC ¶1).

¶2] Mr. S waived his right to a discharge hearing on January 5, 2005, December 20, 2006 and February 8, 2007. (OCC ¶1). In February 2008, Ms. S requested a discharge hearing, but later waived the hearing after an evaluation by an independent examiner. (OCC ¶2). Mr. S requested a discharge hearing on June 26, 2009, an independent evaluation was completed and the district court entered an order on December 31, 2009 continuing Mr. S's commitment to the care, custody and control of the Executive Director of the NDDHS. (OCC ¶2). On September 4, 2010, Mr. S requested another discharge hearing and after a number of continuances, the hearing was held on July 6, 2011 and is the subject of this appeal. (OCC ¶3).

¶3] At the hearing on July 6, 2011, Dr. Robert Lisota, Ph.D. and Dr. Stacey Benson, Psy.D., LP, provided testimony and both their evaluations were received into the evidence at the hearing. (OCC ¶4). Both Dr. Lisota and Dr.

Benson concluded that Mr. S continues to suffer from a number of sexual, personality or other mental disorders, which among them included, Pedophilia, sexually attracted to females, and Anti-social Personality Disorder. (OCC ¶7) Both doctors agree that because Mr. S was a juvenile when he committed the sexually predatory conduct, there are no current actuarial assessments available to assist in predicting Mr. S's likelihood of committing further acts of sexually predatory conduct. (OCC ¶8). Both Dr. Lisota and Dr. Benson conducted a Stable Assessment, looking at Relevant Dynamic Factors to assess Mr. S's likelihood to commit further acts of sexually predatory conduct. (OCC ¶8,9). Dr. Lisota determined that in looking at these factors, along with his continued diagnoses, especially Pedophilia and Anti-Social Personality Disorder, his lack of any significant progression in sex offender treatment and his behavior while in the highly structured environment of the North Dakota State Hospital (NDSH), Mr. S was at high risk to reoffend. (Transcript(T).8 at 23-25, 10 at 1-9, 16 at 15-18).

[¶4] During the review period, Mr. S had several behavioral write-ups and rules violations at the NDSH. Mr. S was found in possession of movies starring prepubescent girls, which violates the rules of his treatment program. (A.A.44,45). Mr. S acknowledged that these movies drive his sexual fantasies and that he did not know if he really wanted to change. (A.A.45). Mr. S received write-ups for being disrespectful toward staff, including an incident when he was telling sexually inappropriate stories to two female staff and would not leave after one of the staff asked him repeatedly to leave. (A.A.34). Mr. S also engaged in a

sexual relationship with another male resident in the treatment program in violation of the rules of the NDSH. (A.A.45).

[¶15] During the review period, Mr. S continued to exhibit sexually inappropriate behavior. Mr. S masturbated to mental imagery of his underage victims. (A.A.36). Mr. S experienced euphoric recall when he discussed one of his underage female victim's in group. (A.A.35). Mr. S masturbated on a regular basis to images of minor females and engaged in sexual fantasies regarding minor females. (A.A.39, 40, 43, 44, 45).

[¶16] Dr. Benson gave Mr. S the ABEL Assessment of Sexual Interest-2 to further assess his current sexual interest. (A.A.75). The results show that Mr. S has a strong sexual interest in girls ages 6-13. (A.A.77). In addition, testing showed sexual interest in adult women and females ages 14-17. (Id.). The testing showed no sexual interest in males of any age. (Id.).

[¶17] Dr. Benson found Mr. S was not likely to engage in future acts of sexually predatory conduct, due to the fact that Mr. S was a juvenile at the time sexual offenses were committed and because there are no actuarial instruments to assess risk for adults who committed sex offenses as juveniles. (T.61).

[¶18] On September 13, 2011, Judge M. Richard Geiger, by clear and convincing evidence, found Mr. S remained a sexually dangerous individual. In addition, Judge Geiger found Dr. Lisota's evaluation and testimony to be more compelling than Dr. Benson's evaluation and testimony. (OCC ¶12(L)). Judge Geiger found that the evidence presented regarding Mr. S's current Pedophilia and Anti-Social Personality disorders, combined with his continued decisions to

disregard the rules and regulations of the NDSH in order to satisfy his desire to sexually act out, as well as, his continued use of real or memorialized images of young females or his victims to drive his sexual fantasies, show an inability to control his behavior and make it likely he will engage in further acts of sexually predatory conduct. (OCC p.9 at 8-15).

LAW AND ARGUMENT

I. THE STANDARD OF REVIEW

[¶9] It is well established law in North Dakota that this Court applies a “modified clearly erroneous” standard of review to the civil commitment of a sexually dangerous individual. This Court will affirm the district court’s decision unless it is induced by an erroneous view of the law, or unless this Court is firmly convinced the district court’s decision is not supported by clear and convincing evidence. In the Matter of Midgett, 2010 ND 98, ¶6, 783 N.W.2d 27 (appeal of petition for discharge from commitment as a SDI); In the Matter of G.R.H., 2006 ND 56, 711 N.W. 2d 587, 591 (appeal of order for SDI involuntary commitment); In the Matter of Hanenberg, 2010 ND 8, ¶7, 777 N.W.2d 62 (appeal of order for SDI involuntary commitment).

[¶10] In addition, this Court also respects the significant role that the district court plays in weighing the credibility of evidence and has consistently recognized that it is not its function, in this type of appeal, to second-guess the district court’s credibility determinations. Hanenberg at ¶9. “If conflict in witnesses’ testimony exist, the district court is in the best position to evaluate the

credibility of the witnesses.” In the Matter of G.R.H., 2008 ND 222, ¶7, 758 N.W.2d 719 (appeal from petition for discharge from commitment as SDI).

II. THERE IS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE DISTRICT COURT’S DECISION THAT MR. S IS LIKELY TO ENGAGE IN FURTHER ACTS OF SEXUALLY PREDATORY CONDUCT AND HAS SERIOUS DIFFICULTY CONTROLLING HIS BEHAVIOR.

[¶11] At a discharge hearing, North Dakota law provides that the State must prove by clear and convincing evidence that a person remains a sexually dangerous individual. N.D.C.C. § 25-03.3-18. The Century Code defines “sexually dangerous individual” at N.D.C.C. § 25-03.3-01(8). At issue in this case is the third prong of the analysis: Is an individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the health or safety of the public. In the Matter of Voisine, 2010 ND 17, ¶9, 777 N.W. 2d 908. In addition, the United States Supreme Court, in its decision in Kansas v. Crane, has added a corollary to the third prong of the standard for commitment. 534 U.S. 407, 413 122 S.Ct. 867 (2002). “This corollary requires the State to demonstrate the individual has serious difficulty controlling his behavior.” Voisine at ¶9.

[¶12] There are various ways the State can provide evidence that a person is likely to engage in further acts of sexually predatory conduct and has serious difficulty controlling his behavior. Risk assessment instruments can play a significant role in providing this evidence, but they are not definitive. “The

importance of independent judicial decision-making means the judge, rather than the test scores of the psychologists who create them, is the ultimate decision-maker. In the Matter of Vantreece, 2009 ND 152, ¶12, 771 N.W.2d 585.

Furthermore, this Court has recognized that **all relevant conduct** should be considered in determining whether an individual has serious difficulty controlling his behavior. (emphasis added). Voisine at ¶14. Mr. S argues in his brief that his behavior during the review period was not “sexually deviant behavior”, therefore the district court erred when it considered Mr. S’s inability to follow the rules in determining whether Mr. S has serious difficulty controlling his behavior.

However, there is no requirement that the district court may only consider sexually deviant behavior. The district court considers all the evidence presented at the hearing, including the expert evaluations and therefore, may consider all behavior and conduct of an individual in assessing whether that individual exhibits serious difficulty controlling their behavior.

[¶13] Here, the district court made detailed findings that Mr. S is likely to engage in further acts of sexually predatory conduct and has serious difficulty controlling his behavior. Judge Geiger discussed numerous areas of reasoning that support both of these conclusions by clear and convincing evidence:

- A) Judge Geiger finds that Mr. S continues to be diagnosed with the disorder pedophilia, with a history of multiple acts of pedophilic conduct at the age of 16 with minor children. (OCC ¶12 A&B). In addition, he also notes that even after placement in a controlled facility as a juvenile there is evidence of him committing sexually predatory

conduct. (OCC ¶12B). In addition, Judge Geiger finds that Mr. S continues also to suffer from antisocial personality disorder. (OCC ¶12M). Dr. Lisota believes that the disorder of pedophilia alone predisposes a person to engage in future sexually predatory conduct. (A.29). In addition, Dr. Lisota states that Mr. S's antisocial personality disorder in combination with his history of sexually reoffending also predisposes Mr. S to engaging in future sexually predatory conduct. (Id.). Moreover, Judge Geiger found that Dr. Lisota's reliance on a person's past behavior predicting future behavior was an important and legitimate factor in determining whether Mr. S was likely to engage in further acts of sexually predatory conduct. (OCC p.9 ¶12, A.29). The United States Supreme Court has recognized that previous instances of violent behavior are important factors in determining future violent behavior. Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072 (1997).

B) Judge Geiger also addresses Mr. S's failure to make significant progress in treatment. (OCC ¶12C). Dr. Lisota testified that Mr. S's lack of progress in and/or completion of treatment increases Mr. S's risk to reoffend because treatment is the only effective means to mitigate a person's baseline risk. (T.10). This Court has recognized that failure to complete sexual offender treatment is a risk factor to be considered by a district court. In the Matter of T.O., this Court acknowledged, "failure to complete sex offender treatment, as well as failure to complete

alcohol dependency treatment, increases an offender's risk to reoffend." 2009 ND 209 ¶10, 776 N.W.2d 47. Although Judge Geiger acknowledges that Mr. S has had some positive experiences in the treatment program, he also finds that it does not last and much of Mr. S's time was spent regressing in treatment. (OCC ¶12 C&D). This finding is supported by both Dr. Lisota and Dr. Benson's evaluations, which noted that he did not progress in treatment and demonstrated problematic beliefs and behaviors. (A.A.32 & 82).

C) Judge Geiger considered Dr. Benson's position that because Mr. S was a juvenile when he committed his sexual offenses and because there are no actuarial assessments to measure his current risk, he is ineligible for civil commitment. However, after reviewing the study Dr. Benson relies on (A.A. at 88), Judge Geiger concluded that Dr. Benson's position and reliance on this study is not controlling in evaluating this case and outcome. (OCC ¶12L). Judge Geiger noted that the study relies on the assumption that juvenile offenders will not continue to suffer from mental disorders as adults. (OCC ¶12L). Clearly, Mr. S does continue to suffer from both pedophilia and antisocial personality disorder into adulthood, as evidenced by both Dr. Benson's and Dr. Lisota's diagnoses. (A.A.77 & 28). In addition, Judge Geiger found that contrary to the study and during the review period, Mr. S continues to lack the ability to control his behavior based upon

his conduct and sexual disciplinary write-ups during the review period. (OCC ¶12L).

- D) Judge Geiger also relies on the Stable Assessments completed by both experts. Judge Geiger goes through the Stable Assessments completed by both experts in detail and compares them, noting that there are many similarities between the two. (OCC ¶9). After considering the dynamic risk factors in both assessments, Judge Geiger agrees with Dr. Lisota's analysis that Mr. S remains at high risk of sexual reoffending over the short term. (OCC ¶9&12N). Judge Geiger finds that the combination of factors involving Mr. S's social rejection and loneliness, lack of concern for others, impulsiveness, poor cognitive processing, sexual preoccupation, use of sex as coping tool, deviant sexual interests, and issues regarding cooperation supports Dr. Lisota's opinion that Mr. S is likely to engage in further acts of sexually predatory conduct. (OCC ¶12N).
- E) Judge Geiger also agreed with Dr. Lisota's concern that Mr. S's numerous write-ups and rules violations while in the secure setting of the NDSH support the conclusion that Ms. S has serious difficulty controlling his behavior. (OCC ¶13). After considering the evidence regarding Mr. S's behavior over the review period, Judge Geiger concluded that if Mr. S is struggling to control his behavior in a secure setting, his behavior will not improve in a less structured environment

in the community and will be much more problematic. (OCC ¶13; T.16; A.31).

[¶14] The State asserts that the district court had ample evidence to conclude that Mr. S is likely to engage in further acts of sexually predatory conduct and has serious difficulty controlling his behavior, therefore he remains a sexually dangerous individual. Furthermore, Judge Geiger made well-reasoned and detailed factual findings which are supported by the record, and which allow this Court to determine that Judge Geiger made the correct decision in continuing the commitment of Mr. S.

CONCLUSION

[¶15] This Court should follow the established law of this State, give deference to the findings made by the district court Judge who heard the evidence, and in all respects affirm the Findings of Fact, Conclusions of Law and Order for Continuing Commitment as it relates to Mr. S.

Dated this 23rd day of April, 2012, at Grafton, North Dakota.

Respectfully submitted,



Kelley M.R. Cole
Walsh County Assistant State's Attorney
ND Bar # 06358
Walsh County Courthouse
600 Cooper Avenue – 3rd Floor
Grafton, North Dakota 58237
Telephone: 701-352-1300
Facsimile: 701-352-1104
Email: kcole@nd.gov
Attorney for the Plaintiff/Appellee

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State's Attorney,	*	
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v.	*	Walsh Co. No. 50-03-R-0089
C.S.,	*	CERTIFICATE OF SERVICE
Respondent/Appellant.	*	

I, Kelley M.R. Cole, do hereby certify that on April 23, 2012, I served the following document:

APPELLEE BRIEF

in PDF format upon the following:

Clerk of the Supreme Court
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

AND

David D. Dusek
Attorney at Law
Attorney for C.S.
david@hdalawyers.com

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this 23rd day of April, 2012.


Kelley M.R. Cole
Assistant State's Attorney
ND Bar No. 05039
Walsh County Courthouse – 3rd Floor
600 Cooper Avenue
Grafton, ND 58237
Telephone: (701) 352-1300
Facsimile: (701) 352-1104
Email: kcole@nd.gov