

IN THE SUPREME COURT
STATE OF NORTH DAKOTASupreme Court No. 20130093
28
McLean Co. No. 20-10-R-00004In the Matter of Larry Gene Rubey

Ladd R. Erickson,
State's Attorney,

Petitioner and Appellee,

v.

Larry Gene Rubey,

Respondent and Appellant.

APPELLANT'S BRIEF

AN APPEAL FROM A SOUTH CENTRAL JUDICIAL DISTRICT COURT'S ORAL ORDER ON A MOTION IN LIMINE DATED FEBRUARY 7, 2013, AND FROM AN ORDER ON DISCHARGE PETITION, SIGNED AND FILED ON FEBRUARY 21, 2013 FROM A HEARING ON A PETITION FOR DISCHARGE, THE HONORABLE BRUCE B. HASKELL, PRESIDING.

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Question Presented for Review

I.

Whether the Trial Erred in Restricting the Presentation of Evidence to Whether Larry Rubey was Likely to Engage in Further Acts of Sexually Predatory Conduct and Whether Larry Rubey had Trouble Controlling His Conduct.

II.

Whether the Trial Court Erred in Concluding that there was Clear and Convincing Evidence that the Respondent/Appellant was likely to Engage in Further Acts of Sexually, Predatory Conduct which would Constitute a Danger to the Physical or Mental Health of Others and has Serious Difficulty in Controlling his Behavior.

1

I. Statement of the Case

2 This is an appeal from a South Central Judicial District Court's oral order on
a motion in limine, dated February 7, 2012 and from an Order on Discharge
Petition, signed and filed on February 21, 2013, from a hearing held on a Petition
for Discharge, the Honorable Bruce B. Haskell, presiding.

3 On September 24, 2012, Larry filed his Application to Request/Waive a
Discharge Hearing requesting hearing. **Register of Actions, Doc ID# 58 [Herein
after Doc ID# __.].** On September 28, 2012, the undersigned was appointed as
respondent's counsel and a Discharge Hearing was scheduled for December 27,
2012. **Doc ID# 60.**

4 On October 3, 2012, the respondent requested the district court to appoint
an independent qualified expert examiner. **Doc ID# 61, 62.** On October, 9, 2012,
the district court granted respondent's request. **Doc ID# 64.**

5 On November 6, 2012, the petitioner requested the hearing be continued.
Doc ID# 65. On November 8, 2012, the district court granted the request. **Doc ID#
66.** The hearing was rescheduled on for February 15, 2013, at 1:30 p.m.

6 The petitioner filed his expert examiner's SDI Annual Re-evaluation on
December, 7, 2012. **Doc ID# 69.** The respondent filed his expert examiner's
evaluation on February 6, 2013. **Doc ID# 70.**

7 On February 7, 2013, the petitioner e-mailed the district court with a request
to have a hearing on the issue of res judicata. **Doc ID# 71.** In the afternoon, the
district court called for a telephonic hearing on the issue of whether previously ruled

issues should be allowed to be heard again. **Transcript on Motion in Limine 1-12 [Hereinafter Tr.ML__]**. On February 8, 2013, the petitioner was allowed to file the e-mail with attachments with the district court. **Doc ID# 71**.

8 On February 15, 2013, a Discharge Hearing was held. **Transcript of Discharge Hearing 1-44. [HereinafterTr.DH__]**. The petitioner introduced two exhibits. The respondent introduced no exhibits. **Tr.DH 2, 34**.

9 On February 21, 2013, the district court signed and filed its Order on Discharge. **Doc ID# 73**.

10 The Clerk of the District for McLean County filed the Notice of Filing the Notice of Appeal. **Doc ID# 75**. On March 25, 2013, the respondent filed his Notice of Appeal. **Doc ID# 74**. The Request for Transcript was filed. **Doc ID# 76**.

11 On May 9, 2013, the transcript of the Motion in Limine was served by the court reporter on all parties. On May 11, 2013, the transcript of the Annual Review Hearing was served on all parties.

12 **II. Statement of the Facts**

13 On February 7, 2013, a telephonic hearing was held on the petitioner's Motion in Limine. **Tr.ML 1-12**. The petitioner's main request was to limit the scope of the Annual Review Hearing based on the concept of *res judicata*. **Tr.ML 1-2**. Specifically, the petitioner requested that the court limit the review hearing to only "what's happen the last time." **Tr.ML 2, Line 20-21**.

14 The respondent argued that nothing was *res judicata*. **Tr.ML 4-6, 8-11**. In the end, it was unclear as to what the court ruled on. What the respondent took

from this hearing was that the only item that was **res judicata** was the first element, that is, for “an individual who is shown to have engaged in sexually predatory conduct.”

15 On September 30, 2011, a hearing was held ***In the Interest of Larry Gene Rubey, Civ. No. 28-10-R-00004, Tr.DH 1-44.*** Dr. Lynn Sullivan testified for the petitioner. **Tr.DH 1-13.** Dr. Stacey Benson testified for Larry Gene Rubey **Tr.DH 25-43.**

16 On direct examination, Dr. Sullivan testified that Larry would likely to engage in future acts of sexually predatory conduct. **Tr.DH 11-12.**

17 On direct examination, Dr. Benson testified that Larry.Rubey did not meet criterion. **Tr.DH 26-34.**

18 As to the first prong, that is, engaging in sexually predatory conduct, neither Dr. Benson nor Dr. Sullivan specifically address this element. **Tr.DH 1-44.**

19 Regarding the second element, whether Larry has a congenital or acquired condition, on direct examination, both Dr. Sullivan stated and Dr. Benson agreed that Larry met this element. **Tr.DH 5-7, Tr.DH 46.**

20 As for the third and fourth elements, Dr. Sullivan expressed her opinion that Larry would likely engage in further predatory conduct and was unable to control his behavior. **Tr.DH 11-12.** Dr. Sullivan based her opinion upon Larry’s risk assessment tool, the Static-99R. **Tr.DH 10.**

21 Dr. Benson testified regarding whether Larry would likely engage in further predatory conduct and was unable to control his behavior. **Tr.DH 26-33.** Dr.

Benson concluded he was not likely to further engage in predatory conduct. **Tr.DH 34-44.** At the close of the hearing, the court took the matter under advisement. **Tr.DH 44.** On February 21, 2013, the court signed and filed its order. **Doc ID# 73.** In the order, “[t]he Court finds that the State has established by clear and convincing evidence that Rubey remains a sexually dangerous offender and therefore his Petitioner for Discharge is DENIED.” *Id.*

22

III. Jurisdiction

23 The district court had jurisdiction under N.D. Const. Art. VI, §8, and N.D.C.C. §27-05-06(1) and N.D.C.C. 25-03.3-02. The appeal from the district court was filed under N.D.R.App.P.4(b). This Court has jurisdiction under N.D. Const, Art. VI, §6, N.D.C.C. §29-01-12, N.D.C.C. §29-28-06 and N.D.C.C. §25-03.3-19.

24

IV. Scope of Review

North Dakota Supreme Court’s Scope of Review of this Appeal is Limited and the Standard is Governed by N.D.C.C. 25-03.3-29 and Rule 52(A) of the North Dakota Rules of Civil Procedure.

25 Pursuant to 25-03.3-19, this Court is "limited to a review of the procedures, findings, and conclusions of the lower court." **N.D.Cent.Code § 25-03.3-19 (2009)**, The standard of review for appeals from commitments of sexually dangerous individuals is a modified clearly erroneous standard. *In Re D.V.A.*, 2004 ND 57, ¶7, 676 N.W.2d 776. "We affirm the trial court's order of committal unless it is induced by an erroneous view of the law or we are firmly convinced the Court's decision is not supported by clear and convincing evidence." *Id.*

26 The "clear and convincing evidence" standard is more than just a standard

imposed by the North Dakota statute. That standard is, in fact, mandated by the due process clauses of the Fourth and Fourteenth Amendments to the United States Constitution. *Addington v. Texas*, 441 U.S. 418 (1979). North Dakota has defined "clear and convincing evidence" as "evidence leading to a firm belief or conviction that the allegations are true." *In Re Korner*, 325 N.W.2d 217, 220 (N.D. 1982) citing *Zundel v. Zundel*, 278 N.W.2d 123, 130 (N.D. 1979).

27 To satisfy due process, the "clear and convincing evidence" standard is a subjective sliding standard which considers (1) the importance of the private interests affected by the proceedings; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest use of the challenged procedure. *Santosky v. Kramer*, 455 U.S. 745, 754-757 (1982). The Court has said that the minimum standard of proof tolerated by the due process requirements reflects not only the weight of the public and private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. *Santosky, supra*. In fact, in *Santosky*, the Court said the "clear and convincing evidence standard" is supposed to convey to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. *Santosky, supra*, 455 U.S. at 768, 770.

28

V. Argument

29 **A. The Trial Erred in Restricting the Presentation of Evidence to Whether Larry Rubey was Likely to Engage in Further Acts of Sexually Predatory Conduct and Whether Larry Rubey had Trouble Controlling His Conduct.**

30 At the end of the telephonic hearing on the petitioner's motion in limine, the

district court held it would not allow any evidence as the first two elements of the definition of a sexually dangerous individual. That is, whether Larry was “an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction” N.D.C.C. 25-03.3-08 (2011). Larry disagreed.

31 Larry now concedes the first element, that is, whether Larry has engaged in sexually predatory conduct. We concede this point because, after Larry had his hearing and the district court ruled, this Court ruled that “[w]hether an individual engaged in sexually predatory conduct is barred by res judicata from being relitigated on a petition for discharge. ***In the Matter J.G., 2013 ND 26 ¶ 11, 827 N.W.2d 341.***

32 However, Larry does not concede as to whether he can present evidence as to the second element, that is, whether Larry who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction. He disagrees because of significant changes that have been made to determine his diagnosis. This is significant because it will affect all individuals who have been involuntarily committed to the North Dakota State Hospital for sex offender treatment.

33 The American Psychiatric Association has now adopted the new DSM V. **Diagnostic and Statistical Manual of Mental Disorders 646-684, 685-705 (5th Ed, 2013).** In some diagnoses, there are even provisions for being “in remission”

or “in a controlled environment.” Diagnostic and Statistical Manual of Mental Disorders 685-705 (5th Ed, 2013).

34

B. Sexually Predatory Conduct

35 Section 25-03.3-01 §§9 of North Dakota Century Code defines “Sexually predatory conduct” as:

- a. Engaging or attempting to engage in a sexual act or sexual contact with another individual, or causing or attempting to cause another individual to engage in a sexual act or sexual contact, if:
 - (1) The victim is compelled to submit by force or by threat of imminent death, serious bodily injury, or kidnapping directed toward the victim or any human being, or the victim is compelled to submit by any threat or coercion that would render a person reasonably incapable of resisting;
 - (2) The victim's power to appraise or control the victim's conduct has been substantially impaired by the administration or employment, without the victim's knowledge, of intoxicants or other means for purposes of preventing resistance;
 - (3) The actor knows or should have known that the victim is unaware that a sexual act is being committed upon the victim;
 - (4) The victim is less than fifteen years old;
 - (5) The actor knows or should have known that the victim has a disability that substantially impairs the victim's understanding of the nature of the sexual act or contact;
 - (6) The victim is in official custody or detained in a treatment facility, health care facility, correctional facility, or other institution and is under the supervisory authority, disciplinary control, or care of the actor;
 - (7) The victim is a minor and the actor is an adult; or
 - (8) The other individual is a person related to the actor within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03 and the actor knows that; or
- b. Engaging in or attempting to engage in sexual contact with another individual or causing or attempting to cause another individual to have sexual contact, if:
 - (1) The actor knows or should have known that the contact is offensive to the victim; or
 - (2) The victim is a minor, fifteen years of age or older, and the actor is the minor's parent, guardian, or is otherwise

responsible for general supervision of the victim's welfare.

N.D.C.C. 25-03.3-01 §§9 (2009)

36 As to this element, Larry concedes that the action he was convicted of
constituted sexually predatory conduct per *In the Matter J.G.*, 2013 ND 26 ¶ 11,
827 N.W.2d 341.

37 **C. A Congenital or Acquired Condition Manifested
by a Sexual Disorder, a Personality Disorder,
or other Mental Disorder or Dysfunction.**

38 As in Part A., Larry concedes that he has an acquired personality disorder.

39 **D. Further Acts of Sexually Predatory Conduct**

40 As to the third element, the court ruled:

The Court finds Dr. Sullivan's opinion to be more convincing than Dr. Benson's. As at the last annual review, Dr. Benson relies primarily on the risk assessment instruments. Those majority of the instruments still demonstrate a "moderate risk" of re-offending, except in the case of the Static-99R which shows a low risk. That instrument seems to be offset by the MnSOST-R (high risk) and the SRA-FV(moderate or high risk depending on how sexualized violence is scored). Further, Dr. Benson places considerable weight on Rubey's turning age sixty when the testimony and common sense tell us that all people do not automatically change when a certain age is reached. While any age change may, across an average of the relevant population result in a reduced risk, such is not the case as applied to Rubey when the entirety of the circumstances is considered. Dr. Benson's opinion that less treatment is needed because Rubey's risk to re-offend has decreased is first, not supported by the evidence when all factors are considered and, second, only makes logical sense if Rubey had in fact made any progress in treatment. The evidence, in Dr. Benson's own words, is that he has made "slow but steady" progress in treatment, however, Dr. Benson was not able to say that this "slow but steady" progress made Rubey more able to deal with his pedophilia and, by implication, less likely to re-offend. That Rubey is taking medication that may reduce his sexuality may be true, but sexually predatory conduct is not necessarily about the sex act itself, but about

domination and control over the victim. Finally, the majority of Dr. Benson's opinions are based on information obtained from Rubey. It is clear from the history of this case that one of Rubey's traits is deceitfulness. Therefore, opinions based on his reporting are suspect. The Court finds Dr. Sullivan's opinions based more on objective observations.

The Court finds that the State has established by clear and convincing evidence that Rubey remains a sexually dangerous offender and therefore his Petition for Discharge is DENIED. App. 72-73.

41 Larry disagrees with the district court and states that there was no clear and convincing evidence as to how there was a nexus or connection between the diagnosis of pedophilia and the predictability that Larry was likely to engage in future predatory conduct.

42 The district court completely ignored Larry's expert's assessment in this category. Dr. Sullivan admitted that she had incorrectly scored Larry's MnSOST-R. **Tr.DH 10, 24.**

43 Dr. Benson stated that she scored Larry's actuarial's and found them to have made a very significant difference in whether Larry likely to engage in future predatory conduct, that is, these actuarials significantly lowered his risk potential since Larry reached age sixty (60). **Tr.DH 35.**

44 **E. Serious Difficulty Controlling Behavior**

45 There was no clear and convincing evidence that Larry had difficulty in controlling his behavior. The district court rule didn't even address this issue. See Order for Discharge Petition. **Doc ID# 73. Appendix at 5-9.**

46 Under **Kansas v. Crane**, 534 U.S. 407, 122S.Ct. 867, 151L.Ed.2d 856 (2002), the court must find whether Larry has difficulty in controlling his behavior.

Even Dr. Sullivan couldn't testify that Larry had difficulty in controlling his behavior.

Tr.DH 21-23. Specifically, Dr. Sullivan testified:

Q. Well, hang on a minute. Now, I've been chastised by the Court, your Honor, for having to go back. She's going back to historical data. I want to know what current evidence do you have that his sex drive is problematic?

A. He has had problems, his group has challenged him during this year on staring at and interacting inappropriately with female staff. They surmise that he is attracted to them.

Q. Was this threatening behavior?

A. No.

Q. Was it violent behavior?

A. No.

Q. It wasn't aggressive behavior?

A. No.

Q. You note then his negative emotionality is possibly present and notes some degree of animosity towards staff?

A. Yes.

Q. Has he been aggressive towards staff?

A. No.

Q. What animosity has he shown?

A. He's been -- let me refer to my notes. He engaged in what we call staff bashing, which is negative.

Q. I can't hear you.

A. He engaged in what we call staff bashing.

Q. Staff bashing?

A. Yes.

Q. Was that staff bad mouthing?

A. Yes.

Q. My terminology. And what was the content of that staff bashing?

A. I don't have details. The note just says that he was told that he causes drama on the unit by bashing staff.

Tr.DH 21-23.

47 There is absolutely no evidence Larry has difficulty in controlling his behavior.

Words like "staff bashing" are deleterious. Dr. Sullivan uses a term like this to make it look like Larry can't control his behavior. It sounds terrible. It sounds violent. But,

when asked for specifics, Dr. Sullivan couldn't come up with one example. You'd think that if accusing Larry of difficulty in controlling his behavior, you would have to back up your statement of "staff bashing." You'd have at least one example of this alleged behavior.

48 As stated by Dr. Benson, there was absolutely no evidence offered by the petitioner, and as far as Dr. Benson could determine there was nothing in Larry's record at the state penitentiary and nothing in his present treatment records at the state hospital that indicated Larry had serious difficulty in controlling his behavior.

49 **F. Conclusion**

50 For the reasons stated above, Larry respectfully requests this court reverse the lower court's decision and order the district court to immediately release Larry.

51 Respectfully submitted this 24th day of June, 2013.

/s/ **Gregory Ian Runge**

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Certificate of Service

I certify that I am the attorney representing Larry to this action. I made service of the Respondent's/Appellant's **BRIEF FOR THE APPELLANT and APPENDIX TO APPELLANT'S BRIEF** by electronic transmission (e-mail) true copies to Mr. Ladd R. Erickson, McLean County State's Attorney, at 712 5th Ave., Washburn, North Dakota 58577 at lrerickson@nd.gov <lrerickson@nd.gov> on this 24th day of June, 2013, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure and Supreme Court Order 14.

/s/ **Gregory Ian Runge**

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Certificate of Service

I certify that I am the attorney representing Larry to this action. I made service of the Respondent's/Appellant's **corrected BRIEF FOR THE APPELLANT and APPENDIX TO APPELLANT'S BRIEF** by electronic transmission (e-mail) true copies to Mr. Ladd R. Erickson, McLean County State's Attorney, at 712 5th Ave., Washburn, North Dakota 58577 at lrerickson@nd.gov <lrerickson@nd.gov> on this 24th day of June, 2013, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure and Supreme Court Order 14.

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