20130093

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
Supreme Court No. 20130093
McLean Co. No. 28-10-R-00004

In the Matter of Larry Gene Rubey

Ladd R. Erickson,
State's Attorney,
Plaintiff/Appellee,
v.

Larry Gene Ruby,
Defendant/Appellant.

BRIEF OF APPELLEE

An Appeal From a South 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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STATEMENT OF THE CASE

1. This is an appeal from the denial of discharge after an annual review of the respondent's status as a sexually dangerous individual.

STATEMENT OF FACTS

2. The state will acquiesce to Rubey's statement of the facts and only supplement facts as the argument requires.

Case History

3. On August 18, 2011, the Court affirmed Rubey's initial SDI commitment. Matter of Rubey, 2011 ND 165, 801 N.W.2d 702. In that initial commitment hearing, both the state's expert and the independent evaluator found Rubey met the SDI criteria. Id. at [¶9].

4. On July 12, 2012, the Court affirmed Rubey's continued commitment after his first annual review. Matter of Rubey, 2012 ND 133, 818 N.W. 2d 731. In that case, both the state's expert and the independent evaluator found that Rubey met the first two prongs of the SDI criteria, i.e. that he [1] engaged in sexually predatory conduct; [2] has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction. Id. at [¶4]. In addition, Rubey conceded that he met these first two prongs of the SDI criteria. Id. at [¶10].

LAW AND ARGUMENT

The Trial Court Did Not Error In Limiting The Scope Of Rubey's Annual Review to Whether There Has Been Any Changes In Rubey So That He No Long Meets The Criteria For Commitment.

5. Commitment of a "sexually dangerous individual" is authorized under N.D.C.C. chapter 25-03.3 if the State clearly and convincingly establishes the individual:

"[1] engaged in sexually predatory conduct;

[2] has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction, that;

[3] 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) In addition to the three requirements of the statute, there must also be proof the committed individual has serious difficulty controlling his behavior to satisfy substantive due process requirements. In the Matter of E.W.F., 2008 ND 130, ¶ 10, 751 N.W.2d 686 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002))." "(The substantive due process requirement of Crane is not a "fourth prong" of N.D.C.C. § 25-03.3-01(8); rather, the constitutional requirement is part of the definition of a "sexually dangerous individual." Matter of R.A.S., 2009 ND 101, ¶ 15, 766 N.W.2d 712. Thus, "we have construed the definition of a sexually dangerous individual to require that there must be 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.' G.R.H., 2008 ND 222, ¶ 7, 758 N.W.2d 719.)"

Scope Of An Annual Review

6. Every respondent would likely wish to have a complete re-litigation of their initial commitment on an annual basis – and the Court has seen the impact of that in constant re-trials in district court and constant appeals and re-appeals on the same issues. The Court took steps to address this in In the Matter J.G., 2013 ND 26, when it ruled that the

respondent's previous adjudications for committing sexually predatory conduct were *res judicata*. Id. at [¶11]

7. In this matter, even though Rubey was initially adjudicated as having a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction - with both experts in agreement on that point. And, even though both experts agreed on this prong and Rubey conceded he met this prong during the first annual review – he now argues that this prong was not *res judicata* and the trial court erred in limiting the review hearing to whether there had been changes in Rubey so he was no longer likely to engage in sexually predatory conduct. (It is important to note that in this case the independent evaluator also found Rubey met the second prong of the SDI criteria because she agreed that Rubey has pedophilia. (State's App. p. 45))

8. The state believes Rubey mis-reads N.D.C.C. §25-03.3-18(4), which limits annual SDI review hearings to whether there have been and changes since the last hearing that would make a respondent not likely to reoffend. In essence, annual review hearings are not vehicles to re-litigate whether a person should have been initially committed:

> 4. At any hearing held pursuant to a petition for discharge, the burden of proof is on the state to show by clear and convincing evidence that the committed individual *remains* (*emphasis added*) a sexually dangerous individual.

9. By using the word "remains" the legislature has indicated that the annual review is to consider the facts since the initial adjudication of being a sexually dangerous individual. Has something changed, such as treatment progress or a physical problem, that reduces a respondent's risk to reoffend is the heart of the matter upon an annual review because those things might mean a person no longer "remains" a SDI.

10. The legislative history of §25-03.3-18 supports the State's interpretation of the statute. On March 5, 1997, Solicitor General Laurie Loveland from the North Dakota Attorney's General's Office testified before the Senate Judiciary Committee regarding H.B. 1047, the bill that eventually established the SDI system. In her testimony, Solicitor General Loveland stated:

> "For example, the respondent has a right to be present and testify at the preliminary hearing, the commitment hearing, and ***any post commitment hearing to determine whether he or she is ready for discharge***. At each stage of the proceeding the respondent has a right to counsel and to be examined by a qualified expert of his or her own choosing.
>
> Under H.B. 1047 the ***burden is placed on the State to report to the court at least annually concerning the committed person's progress and whether the committed person has met the requirements for release***. If the committed person has not had a discharge hearing before the court within the preceding year, the committed individual has a right to a hearing at that annual review. At the discharge hearing the committed person will be afforded all the constitutionally required procedures in the initial commitment hearing.
>
> In addition, the committed individual can petition at any time for release. If there has been no hearing in the preceding year, the court must hold a hearing on the committed individual's petition at that time.
>
> H.B. 1047 states explicitly that whenever a discharge hearing is held the State bears the burden of showing by clear and convincing evidence that the committed individual ***remains*** a sexually dangerous individual." *(emphasizes added)*

11. Clearly, the legislature was informed that the post commitment hearing process is designed, not as a device to re-litigate or challenge the original commitment order, but to determine if the person is "*ready for discharge;*" assessing the "*committed person's progress and whether the committed person has met the requirements for release;*" and does the person "*remains a sexually dangerous individual.*"

12. Frankly, an independent evaluator, if the law allows it, can always collaterally attack the diagnoses in the second prong of the SDI criteria, and that way they can avoid the lack of treatment progress regarding the third prong. In other words, the criteria for SDI commitments means that people meeting that criteria have serious problems to address, and the first few years after the initial commitment aren't likely to involve any substantial step towards reducing their risk to reoffend. It just takes more time than that.

13. An absolutely counterproductive result of a reading of N.D.C.C. §25-03.3-18(4), like Rubey would have the Court make, is it gives the respondents the attitude that they shouldn't have been committed in the first place according to their independent evaluator – which in turn creates problems for the professionals trying to treat them – which in turn leads to them staying confined longer. It is all circular. By the time the Court issues its opinion on this appeal, Rubey may be within weeks of being eligible for another annual review hearing. The only way to stop the merry-go-round and create a productive review system that comports with the plain language and legislative intent of SDI annual review hearings is to rule that both prongs one and two of the SDI criteria, after being established and affirmed, are *res judicata* - and all eyes and minds, including the independent evaluators, need to focus on changes that might mitigate reoffending risks.

Changes From The Previous Annual Review

14. The trial court detailed why Rubey still met the criteria for SDI commitment in its written opinion. (Resp. App. p. 5-9) As the Court has repeatedly said, "We review civil commitments of sexually dangerous individuals under a modified clearly erroneous standard in which we will affirm a district court's order "unless it is induced by an erroneous view of the law or we are firmly convinced [the order] is not supported by

clear and convincing evidence." In re T.O., 2009 ND 209, ¶ 8, 776 N.W.2d 47 (quotations omitted).

15. When the independent evaluator was cross-examined by the state during the review hearing, she admitted that the only difference in the conclusion paragraph of her report from this year compared to the report she wrote for the first annual review was the fact that Rubey had aged one year:

> Q. BY MR. ERICKSON: Doctor, I'm going to hand you what I've marked State's Exhibit 2. It's two pages of your report from last year. Does that ring familiar to you?
>
> A. Yes.
>
> MR. ERICKSON: Your Honor, I move to admit State's 2.
>
> MR. RUNGE: No objection, your Honor.
>
> THE COURT: Thank you. It is received.
>
> Q. Now, Doctor, I'll give you a copy so you don't have to dig. I've highlighted a section to ask you about. On the conclusion after the word, "no," I highlighted that. Do you see that, Doctor?
>
> A. Yes.
>
> Q. Now, if you compare that to Page 38 of your request this year, we started with this baseline last year. You conclude he's age 59. 28 years away from the MnSOST-R score or 31 or the age of 31 on the MnSOST-R?
>
> A. Yes.
>
> Q. Your report this year, all you do is change the date. His age is 60, and now he's 20 years away. Those paragraphs are identical then; correct?
>
> A. Those two sentences are.
>
> Q. The whole paragraph is basically identical?
>
> A. Well, I comment on the fact - - on this report I comment his risk assessment is going to drop to low risk next year. In my report this year, I comment it has

dropped this year. I won't say it's identical. I would say it certainly creates very similar arguments.

Q. You conclude he was moderate last year and you conclude he's moderate this year?

A. Yes. (tr. p. 34, lines 14-25, p. 35, lines 1-18)

Q. Did you read the Supreme Court opinion from the review we did last year in this case?

A. If I did, it would have been when it first came out and not again.

Q. Doctor, I'm concerned that last year the Court seemed to focus a lot and they affirmed the findings on the treatment progress or lack thereof. And the courts order, the district court's order spelled out that Dr. Lisota had noted that, and that was an important factor not only in this Supreme Court case but many of them; isn't that right, when you read them?

A. Yes, I think I spent more pages talking about - -

Q. Where in your conclusion do you talk about his treatment progress?

A. It you'll look on Page 38 the final paragraph, I say, "I make this opinion after taking into account his history, his diagnoses, his past sexual crimes, his risk scores, his age, his medical status, his work in treatment, my file review of the last year at the North Dakota State Hospital, and the full breadth and depth of my clinical training and experience.

Q. So when you get to "his work in treatment" part of that, you don't dispute that he's still in Stage 1 of the treatment progress?

A. Correct. (Tr. p. 37, lines 15-25, p. 38, lines 1-14)

16. The independent evaluator's focus in this case highlights, once again, the problem with open ended re-litigation style review hearings. Dr. Benson's lengthy evaluation (State's App. p. 21-59), reaches the conclusion that Rubey is still in the first stage of treatment, like he was the year prior when she was the independent evaluator for his first annual review, and all she did in her conclusion paragraph was update Rubey's age from the year before.

CONCLUSION

17. The state respectfully requests the Court affirm the trial court's finding that Rubey still meets the criteria for SDI, and the trial court was correct in limiting the review hearing to whether Rubey has progressed in efforts to reduce his risk to reoffend. Our current SDI annual review process amounts to a "pack the record" system. The state evaluators feel compelled to detail surplus materially in their reports and testify on historical events in review hearings so the record is "packed." The independent evaluators do the same thing, as is evidenced by Dr. Benson's 39 page report in this case that goes back to all the defendant's prior acts, evaluations, etc. The trial courts then have to sort through a large percentage of irrelevant material to get at whether the respondent "remains" SDI. The Court can get annual review hearings and appeals back on the rails by affirming the trial court's limitation on the scope of this annual SDI review hearing.

18. Respectfully submitted this 24th day of July, 2013.

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AFFIDAVIT OF SEVICE BY MAIL

State of North Dakota)
) ss:
County of McLean)

1. Marcella Albers, being first duly sworn, deposes and says she is more than 18 years of age and that on the 24th day of July, 2013, she served the following:

BRIEF OF APPELLEE and STATE'S APPENDIX

by placing a true and correct copies thereof in an envelope addressed as follows:

Gregory Ian Runge
Attorney at Law
1983 E. Capitol Avenue
Bismarck, ND 58501

and depositing the same, with postage prepaid, in the United States mails at Washburn, North Dakota.

Marcella Albers

2. Subscribed and sworn to before me this 24th day of July, 2013.

Notary Public

MARY ANN ANDERSON
Notary Public
State of North Dakota
My Commission Expires June 14, 2019

MARY ANN ANDERSON
Notary Public
State of North Dakota
My Commission Expires June 14, 2019