

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB -4 2015

In the Interest of Jeremy Tim Johnson

Christene A. Reiersen,)
Assistant State's Attorney,)

Petitioner and Appellee,)

vs.)

Jeremy Tim Johnson,)

Respondent and Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20140366

District Court No. 51-2012-MH-00014

APPEAL FROM THE DISTRICT COURT
ORDER DATED OCTOBER 3, 2014
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE GARY H. LEE
JUDGE OF THE DISTRICT COURT, PRESIDING

BRIEF OF APPELLEE

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[¶1] STATEMENT OF THE ISSUES

[¶2] I. The District Court did not err when it determined there was clear and convincing evidence that Jeremy Johnson remains a Sexually Dangerous Individual.

[¶3] II. Jeremy Johnson remains a Sexually Dangerous Individual which warrants continued civil commitment.

[¶4] STATEMENT OF THE CASE

[¶5] The State has reviewed Jeremy Johnson's Statement of the Case starting at Paragraph 4 of Appellant's Brief and has no objections or corrections.

[¶6] STATEMENT OF FACTS

[¶7] Jeremy Johnson was committed to the North Dakota State Hospital as a sexually dangerous individual on September 26, 2012. (Appellant's Appendix (App.) p. 9). The details of the civil commitment are located in this Court's opinion in In re Johnson, 2013 ND 146, 835 N.W.2d 806. Jeremy Johnson, pursuant to Section 25-03.3-18 of the North Dakota Century Code, petitioned for discharge from the North Dakota State Hospital. (App. p. 5, 9). A hearing on the petition for discharge was held on August 20 and 21, 2014. (App. p. 9). Dr. Robert Lisota, from the North Dakota State Hospital, testified at the hearing. (Transcript on Appeal, volume 1 (Tr. 1), p. 9-144). Dr. Lisota filed a SDI Annual Re-evaluation. (Appellee's Transcript (Appellee's App.) p. 1-34). The SDI Annual Re-evaluation included treatment notes for Jeremy Johnson from October 25, 2012 through July 18, 2013. A SDI Annual Re-evaluation Addendum was filed by Dr. Lisota on February 19, 2014. (Appellee's App. p. 35-58). The Addendum contained Jeremy Johnson's treatment notes from July 16, 2013 through February 11, 2014. Finally, a SDI Annual Re-evaluation Addendum #2 was filed on August 6, 2014. (Appellee's App. p. 59-76). The second addendum included treatment notes for Jeremy Johnson from February 14, 2014 through July 25, 2014. Dr. Troy Ertelt testified on behalf of Jeremy Johnson. (Tr. 1, p. 148-250). Finally, Dr. Stacey Benson testified on behalf of Jeremy Johnson. (Transcript on Appeal, volume 2 (Tr. 2), p. 257-371).

[¶8] At the outset of the hearing, Jeremy Johnson stipulated that prong one of the analysis on whether he remained a sexually dangerous individual, that he had engaged in sexually predatory conduct, was res judicata. (Tr. 1. p. 7, l. 4-8). With regard to the second prong, whether Jeremy Johnson has a congenital or acquired condition manifested

by a sexual or personality disorder, Dr. Lisota testified that he reviewed the initial evaluation conducted by Dr. Krance of Jeremy Johnson. (Tr. 1, p. 13-14, l. 9-25, 1-5). Dr. Lisota was aware that Dr. Krance had diagnosed Jeremy Johnson with Paraphilia, not otherwise specified, hebephilia; alcohol abuse; and Antisocial Personality Disorder. (Tr. 1, p. 13, l. 21-24). Dr. Lisota testified that, after reviewing all of the information available, he concurred with Dr. Krance's diagnoses. (Tr. 1, p. 14, l. 2-8). Finally, Dr. Lisota testified "I diagnosed [Jeremy Johnson] with paraphilic disorder and antisocial personality disorder, either of which would satisfy Prong 2 of North Dakota's SDI law." (Tr. 1, p. 27-28, l. 24-25, 1).

[¶9] Dr. Lisota also testified regarding the third prong, whether the diagnoses establish a reason to believe that Jeremy Johnson would engage in further acts of sexually predatory conduct. (Tr. 1, p. 28-44). Dr. Lisota testified "Lots of people have antisocial personality disorder. But the vast majority of them are not sexual offenders and they're not repeat sexual offenders. In Mr. Johnson's case we have multiple sexual offenses despite legal sanction. In my professional opinion, those behaviors are driven by the disorders we've been discussing." (Tr. 1, p. 28, l. 9-15).

[¶10] Dr. Lisota further testified regarding the last prong, whether Jeremy Johnson would have difficulty controlling his behavior. (Tr. 1, p. 44-46). Dr. Lisota testified that Jeremy Johnson would have difficulty controlling his sexual behavior outside of the State Hospital. (Tr. 1, p. 44, l. 17-22). This conclusion was based in part on the fact that Jeremy Johnson had difficulty controlling his behavior, including his sexual behavior, while in the confined setting of the State Hospital. (Tr. 1, p. 44-45, l. 22-25, 1-9). Dr. Lisota testified that Jeremy Johnson had kissed a peer on the cheek and

then threatened other peers not to say anything about the incident. (Tr. 1, p. 45, l. 3-6). Jeremy Johnson also engaged in horseplay and touching others inappropriately on the unit at the State Hospital. (Tr. 1, p. 45, l. 6-8).

[¶11] Finally, Dr. Lisota testified as to Jeremy Johnson's progress in treatment at the North Dakota State Hospital. Jeremy Johnson "consistently stated that he's pursuing a legal discharge from the State Hospital. His participation in treatment has been very superficial at best." (Tr. 1, p. 24, l. 20-23). The therapy notes regarding Jeremy Johnson indicate that he is in denial, that he is "the victim in all of this," and that he believes he should not be at the State Hospital because he had done his time and has done treatment. (Tr. 1, p. 43, l. 15-17). Dr. Lisota also testified that Jeremy Johnson was in the exact same position in treatment at the time of the discharge hearing as when he was initially civilly committed as a sexually dangerous individual. (Tr. 1, p. 45-46, l. 20-25, 1-2). Jeremy Johnson has made no progress in treatment at the State Hospital. (Tr. 1, p. 45, l. 20-23).

[¶12] Dr. Ertelt testified that Jeremy Johnson did not meet the criteria as a sexually dangerous individual. (Tr. 1, p. 159, l. 21-24). Dr. Ertelt provisionally diagnosed Jeremy Johnson with antisocial personality disorder. (Tr. 1, p. 164, l. 8-9). Dr. Benson also testified that Jeremy Johnson did not meet the criteria as a sexually dangerous individual. (Tr. 2, p. 263, l. 19-20). Dr. Benson, like Dr. Ertelt, provisionally diagnosed Jeremy Johnson with antisocial personality disorder. (Tr. 2, p. 264, l. 1-2).

[¶13] The court, based upon all of the testimony provided, found that Jeremy Johnson had engaged in sexually predatory conduct. (App. p. 11-15). The court also found that Jeremy Johnson met prong two of the analysis, that Jeremy Johnson has a

congenital or acquired condition that is manifested by a sexual disorder or personality disorder, or other mental disorder or dysfunction. (App. p. 15-18). The court specifically found that all three doctors found that Jeremy Johnson was diagnosed with antisocial personality disorder. (App. p. 15). The court pointed out that Jeremy Johnson “was initially committed as a sexually dangerous individual because of his repeated acts of sexual contact and sexual acts with underage girls,” and was diagnosed with a sexual disorder, hebephilia. (App. p. 16). The court also found that “Dr. Lisota concluded that Johnson has not engaged in treatment at a level which could reasonably be expected to change any prior diagnosis. The record supports this conclusion.” (App. p. 17).

[¶14] The court also discussed the third prong, whether Jeremy Johnson’s condition makes him likely to engage in further acts of sexually predatory conduct. (App. p. 18-19). The court stated that Johnson “has repeatedly taken sexual advantage of underage girls. Until he can control his behavior, he will remain a danger.” (App. p. 18). The court found that this conclusion was supported by the evidence presented by each of the three doctors that testified. (App. p. 18). The court found that there was “agreement among the experts that Johnson is at high risk for re-offending.” (App. p. 19). Finally, the court found “by clear and convincing evidence that Johnson will not have the tools necessary to enable him to control his dangerous behavior” without adequate progress in treatment. (App. p. 17). The court also found that Jeremy Johnson will be a danger until he can control his behavior. (App. p. 18).

[¶15] LAW AND ARGUMENT

[¶16] I. The District Court did not err when it determined there was clear and convincing evidence that Jeremy Johnson remains a Sexually Dangerous Individual.

[¶17] Chapter 25-03.3 of the North Dakota Century Code governs commitment of sexually dangerous individuals. This Court “review[s] 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 Rubey, 2012 ND 133, ¶ 8, 818 N.W.2d 731. “At a discharge hearing, the State has the burden of proving by clear and convincing evidence that the committed individual remains a sexually dangerous individual.” In re G.L.D., 2011 ND 52, ¶ 4, 795 N.W.2d 346.

A sexually dangerous individual means 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 that 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.

Rubey, 2012 ND 133, at ¶ 8 (quoting N.D. Cent. Code § 25-03.3-01(8)). “Substantive due process requires proof that the individual facing commitment has serious difficulty controlling his behavior.” Id.

[¶18] Appellant argues that the District Court erred in determining there was clear and convincing evidence that Jeremy Johnson remains a sexually dangerous individual. The first prong the State needs to prove by clear and convincing evidence is that the individual engaged in sexually predatory conduct. This Court has held that prong one “is

proven by a prior adjudication that respondent engaged in sexually predatory conduct. Res judicata prevents relitigation of that inquiry.” In re Graham, 2013 ND 171, ¶ 12, 837 N.W.2d 382. Jeremy Johnson stipulated that prong one of the analysis of whether he remained a sexually dangerous individual was res judicata. (Tr. 1. p. 7, l. 4-8). The district court also recapped Jeremy Johnson’s past conduct and criminal charges and made the finding that Jeremy Johnson engaged in sexually predatory conduct and remains a sexually dangerous individual. (App. p. 11-15).

[¶19] The second prong the State must prove by clear and convincing evidence is that Jeremy Johnson has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction. Dr. Lisota found that Jeremy Johnson met the diagnostic criteria for Other Specified Paraphilic Disorder (Hebephilia, Non-exclusive Type), Alcohol Use Disorder, and Antisocial Personality Disorder. (Appellee’s App. p. 11). Dr. Ertelt and Dr. Benson provisionally diagnosed Jeremy Johnson with Antisocial Personality Disorder. (Tr. 1, p. 164, l. 8-9; Tr. 2, p. 264, l. 1-2).

[¶20] Jeremy Johnson argues on appeal, as he did at the district court level, that the diagnosis of Antisocial Personality Disorder is insufficient to continue Johnson’s civil commitment. (App. p. 15-16). This Court has held “a diagnosis of antisocial personality disorder alone does not establish a nexus between the requisite disorder and future dangerousness.” In re Wolff, 2011 ND 76, ¶ 7, 796 N.W.2d 644. “[T]he evidence presented by the State must clearly show the antisocial personality disorder is likely to manifest itself in a serious difficulty controlling one’s behavior.” Id. This does not

“require the conduct evidencing the individual’s serious difficulty in controlling his behavior to be sexual in nature.” Id.

[¶21] The trial court found that Jeremy Johnson was initially committed “because of his repeated acts of sexual contact and sexual acts with underage girls, and this was diagnosed as a sexual disorder or dysfunction.” (App. p. 16). The trial court relied upon the holding in In re Johnson, 2013 ND 146, 835 N.W.2d 806, which was the appeal to this Court from the trial court’s initial finding to civilly commit Jeremy Johnson as a sexually dangerous individual, in making this finding. (App. p. 16). The court went on and made the finding that Jeremy Johnson has been diagnosed with a paraphilic disorder and antisocial personality disorder. (App. p. 17).

[¶22] The findings made by the district court were substantiated by the testimony of Dr. Lisota. Dr. Lisota testified that he reviewed the initial evaluation conducted by Dr. Krance of Jeremy Johnson. (Tr. 1, p. 13-14, l. 9-25, 1-5). Dr. Lisota was aware that Dr. Krance had diagnosed Jeremy Johnson with Paraphilia, not otherwise specified, hebephilia; alcohol abuse; and Antisocial Personality Disorder. (Tr. 1, p. 13, l. 21-24). Dr. Lisota testified that, after reviewing all of the information available, he concurred with Dr. Krance’s diagnoses. (Tr. 1, p. 14, l. 2-8). Finally, Dr. Lisota testified “I diagnosed [Jeremy Johnson] with paraphilic disorder and antisocial personality disorder, either of which would satisfy Prong 2 of North Dakota’s SDI law.” (Tr. 1, p. 27-28, l. 24-25, 1). The State provided clear and convincing evidence that Jeremy Johnson has a congenital or acquired disorder that is manifested by a sexual disorder, or personality disorder, or other mental disorder or dysfunction.

[¶23] The third prong the State must prove by clear and convincing evidence is that Jeremy Johnson is likely to engage in further acts of sexually predatory conduct. The district court state “Johnson entered the State Hospital as a sexually dangerous person.” (App. p. 18). The district court found that Johnson “has repeatedly taken sexual advantage of underage girls. Until he can control his behavior, he will remain a danger.” (App. p. 18). The district court based this finding upon the risk assessments from all three doctors. (App. p. 18). The Static-99R risk assessment administered by all three doctors placed Jeremy Johnson in the high risk to reoffend category. (App. p. 18). The Court also noted that the SRA:FV, another risk assessment which was utilized by Dr. Benson, scored Jeremy Johnson in the high risk for reoffending category. (App. p. 18).

[¶24] Finally, the Court referenced Dr. Lisota’s testimony that Jeremy Johnson has not participated meaningfully in treatment at the North Dakota State Hospital. (App. p. 19). It was Dr. Lisota’s opinion that Jeremy Johnson remains likely to commit further acts of sexually predatory conduct given his performance in treatment up to the date of the hearing. (App. p. 19). The Court agreed with Dr. Lisota’s opinion. (App. p. 19). Jeremy Johnson was a sexually dangerous individual when he entered the State Hospital. (App. p. 18). Jeremy Johnson has done nothing in treatment to lower his risk of reoffense or make him no longer a sexually dangerous individual. (App. p. 18-19). The district court’s finding, by clear and convincing evidence, that Jeremy Johnson is likely to engage in further acts of sexually predatory conduct was supported by the evidence presented by the State.

[¶25] The last prong the State must prove by clear and convincing evidence is that Jeremy Johnson will have serious difficulty controlling his behavior. The district court,

through the testimony of Dr. Lisota, the SDI Annual Re-evaluation, the SDI Annual Re-evaluation Addendum, and the SDI Annual Re-evaluation Addendum #2, made findings that Jeremy Johnson will have serious difficulty controlling his behavior. (App. p. 17). Dr. Lisota testified that Jeremy Johnson would have difficulty controlling his sexual behavior outside of the State Hospital. (Tr. 1, p. 44, l. 17-22). This conclusion was based in part on the fact that Jeremy Johnson had difficulty controlling his behavior, including his sexual behavior, while in the confined setting of the State Hospital. (Tr. 1, p. 44-45, l. 22-25, 1-9). Dr. Lisota testified that Jeremy Johnson had kissed a peer on the cheek and then threatened other peers not to say anything about the incident. (Tr. 1, p. 45, l. 3-6). Jeremy Johnson also engaged in horseplay and touching others inappropriately on the unit at the State Hospital. (Tr. 1, p. 45, l. 6-8).

[¶26] The Court found that Jeremy Johnson

has made minimal, if any, progress in treatment programs designed to help him control his behavior. . . . [H]is participation in treatment is lackluster and perfunctory. He denies he has a problem, minimizes his wrongdoing, and blames his victims. He believes that he is wrongly committed, that he has done his time, and that the Court should simply let him out of the State Hospital. Lastly, he believes that treatment is an inconvenience.

(App. p. 17). The district court also noted “at this point, Johnson refuses to even recognize that his behavior was dangerous to others, or that his actions cause harm to others. Johnson remains a danger to the community” (App. p. 17). Each of these findings is supported by the testimony of Dr. Lisota and the Re-evaluation along with the addendums. The State provided, by clear and convincing evidence, that Jeremy Johnson will have serious difficulty controlling his behavior.

[¶27] II. Jeremy Johnson remains a Sexually Dangerous Individual which warrants continued civil commitment.

[¶28] The argument presented under this issue requires the same analysis as the issue presented in the previous section. Therefore, the State would rely upon the law and analysis presented in issue I above. The State would note that Jeremy Johnson makes an issue of the fact that Dr. Benson and Dr. Ertelt personally interviewed Johnson and Dr. Lisota did not interview Johnson. The State would refer this Court to the transcript of the discharge hearing, volume one, pages 155 through 159. Jeremy Johnson attempted to make this an issue at the district court level. However, the district court pointed out that Jeremy Johnson refused the interview with Dr. Lisota at the advice of his attorney. (Tr. 1, p. 155, l. 12-14). The district court advised that “you can’t complain about a problem that you created.” (Tr. 1, p. 156, l. 16-17; see e.g. In re M.D., 1999 ND 160, ¶ 17, 598 N.W.2d 799 (The evaluation was completed and the case was ready to proceed to a hearing within the first extension when M.D. requested an independent evaluation and concomitant extension of time. The court granted M.D.’s request. M.D. cannot now complain about the delay occasioned by his own request for an independent evaluation.”)).

[¶29] Jeremy Johnson also argues that the Court improperly shifted the burden to Johnson. Jeremy Johnson quotes the trial court’s Order at paragraph 27. The trial court did not shift the burden to Jeremy Johnson. The trial court stated that the burden was on the State to prove by clear and convincing evidence that Jeremy Johnson is a sexually dangerous individual. (App. p. 11). The trial court then addressed each prong of the test to determine whether Jeremy Johnson is a sexually dangerous individual. (App. p. 11-19). The trial court found that the State provided by clear and convincing evidence that

Jeremy Johnson was, and remains, a sexually dangerous individual. (App. p. 11-19). It was after these findings that Jeremy Johnson argues the trial court shifted the burden to him by quoting paragraph 27 of the trial court's Order. The trial court was merely reciting the facts. Jeremy Johnson has not engaged in treatment at all. (Tr. 1, p. 45, l. 20-23). The evidence presented shows that Jeremy Johnson is in denial, he believes that he is "the victim in all of this," and he believes he should not be at the State Hospital because he had done his time and has done treatment. (Tr. 1, p. 43, l. 15-17).

[¶30] The State provided, by clear and convincing evidence, that Jeremy Johnson meets the criteria set forth for civil commitment as a sexually dangerous offender as outlined in issue I above and this Court should affirm the district court's Order.

[¶31] CONCLUSION

[¶32] The North Central Judicial District Court's Order denying Jeremy Johnson's petition for discharge from the North Dakota State Hospital was supported by clear and convincing evidence and should be affirmed. Jeremy Johnson has been found to have engaged in sexually predatory conduct. Jeremy Johnson has also been diagnosed with paraphilic disorder and antisocial personality disorder by Dr. Lisota. Jeremy Johnson was provisionally diagnosed with antisocial personality disorder by Dr. Ertelt and Dr. Benson. The district court's findings that Jeremy Johnson has a sexual disorder, a personality disorder, or other mental disorder or dysfunction was proper and supported by the evidence presented. The State also provided, by clear and convincing evidence, that Jeremy Johnson is likely to engage in further acts of sexually predatory conduct and Jeremy Johnson will have serious difficulty controlling his behavior. Therefore, the State argues the District Court's rulings should be affirmed.

Respectfully submitted this 4th day of February, 2015



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Supreme Court No. 20140366
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[¶33] AFFIDAVIT OF SERVICE BY MAIL

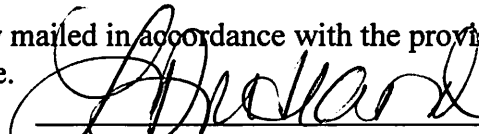
Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty/one years, and is not a party to nor interested in the above entitled action; that on the 4 day of February, 2015, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action: **BRIEF OF APPELLEE and APPELLEE'S APPENDIX**

That said envelope was addressed to the following person at his address as follows:

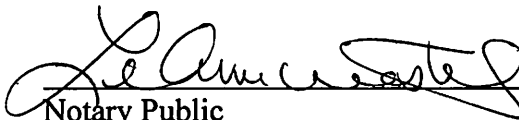
**TYLER J. MORROW
ATTORNEY AT LAW
301 N 3RD ST STE 300
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That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Lynnae Rudland

Subscribed and sworn to before me this 4 day of February, 2015, by
Lynnae Rudland



Notary Public

