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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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In the Interest of Jeremy Tim Johnson

OCT 22 2015

Rozanna C. Larson,)
County State's Attorney,)

STATE OF NORTH DAKOTA

Petitioner and Appellee,)

Supreme Court No. 20150217

vs.)

District Court No. 51-2012-MH-00014

Jeremy Tim Johnson,)

Respondent and Appellant.)

APPEAL FROM THE DISTRICT COURT
ORDER DENYING MOTION TO RELEASE
FOLLOWING ANNUAL REVIEW ISSUED JUNE 5, 2015
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

Kelly A. Dillon #05296
Deputy Ward County State's Attorney
Ward County Courthouse
PO Box 5005
Minot ND 58702-5005
Telephone (701) 857-6480
51wardsa@wardnd.com
Attorney for Petitioner and Appellee

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[¶1] STATEMENT OF THE CASE

[¶2] The State has reviewed Jeremy Johnson's Statement of the Case starting at Paragraph 3 of Appellant's Brief and has no objections or corrections.

[¶3] STATEMENT OF FACTS

[¶4] Jeremy Johnson was committed to the North Dakota State Hospital as a sexually dangerous individual on September 26, 2012. The details of the civil commitment are found in this Court's opinion in In re Johnson, 2013 ND 146, 835 N.W.2d 806. Johnson, pursuant to Section 25-03.3-18 of the North Dakota Century Code, petitioned for discharge from the North Dakota State Hospital. A hearing on the petition for discharge was held on August 20 and 21, 2014. Dr. Robert Lisota, from the North Dakota State Hospital, testified at the hearing. Dr. Lisota filed a SDI Annual Re-evaluation. The SDI Annual Re-evaluation included treatment notes for Johnson from October 25, 2012 through July 18, 2013. A SDI Annual Re-evaluation Addendum was filed by Dr. Lisota on February 19, 2014. The Addendum contained 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. The second addendum included treatment notes for Johnson from February 14, 2014 through July 25, 2014. Drs. Troy Ertelt and Stacey Benson testified on behalf of Jeremy Johnson.

[¶5] The trial court found, by way of Order dated October, 3, 2014, that Johnson remained a sexually dangerous individual. Johnson appealed that decision, which appeal came on for oral argument before this Court on March 2, 2015. On April 15, 2015, this Court issued its decision, reversing and remanding for the trial court to make specific findings of fact on whether Johnson has serious difficulty controlling his behavior. In re Johnson, 2015 ND 71, 861 N.W.2d 484.

[¶6] On remand, the trial court gave the parties the option to 1) start the review proceedings anew, 2) reargue the facts and the case already before the trial court, or 3)

allow the trial court to review the record as previously presented and make further findings on that record. The parties opted for the third option. Accordingly, the trial court conducted further review and issued its Order, finding that Johnson remained a sexually dangerous individual, likely to reoffend, on June 5, 2015. Appendix 10-23. Johnson appealed.

[¶7] LAW AND ARGUMENT

[¶8] I. The District Court Correctly Determined that Jeremy Tim Johnson Remains a Sexually Dangerous Individual Having Serious Difficulty Controlling His Behavior.

[¶9] On remand, the trial court is bound by the mandate rule, which requires the trial court to follow pronouncements of the Supreme Court on legal issues, and to carry the Supreme Court's mandate into effect "according to its terms." State v. Burckhard, 1999 ND 64, ¶7, 592 N.W.2d 523. This Court "retain[s] the authority to decide whether the district court fully carried out our mandate's terms." Law v. Whittet, 2015 ND 16, ¶5, 858 N.W.2d 636.

[¶10] 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.

[¶11] Appellant argues that the District Court erred in determining there was clear and convincing evidence that 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. Johnson stipulated that prong one of the analysis of whether he remained a sexually dangerous individual was res judicata. Appellant’s Brief, ¶10. The district court also recapped Johnson’s past conduct and criminal charges and made the finding that Johnson engaged in sexually predatory conduct and remains a sexually dangerous individual. (App. p. 13-14).

[¶12] The second prong the State must prove by clear and convincing evidence is that Johnson has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction. Johnson concedes that the State has shown by clear and convincing evidence that he suffers from an actual sexual disorder, a personality disorder, or other mental dysfunction that would subject him to commitment as a sexually dangerous individual. Appellant’s Brief, ¶10. The district court recapped its findings as to this prong in its Order on remand. (App. 14-16).

[¶13] The third prong the State must prove by clear and convincing evidence is that Johnson is likely to engage in further acts of sexually predatory conduct as a result of his disorder. Additionally, substantive due process requires the State to prove the committed individual has serious difficulty controlling his behavior. In the Matter of Wolff, 2011 ND 76, ¶7, 796 N.W.2d 644.

[¶14] This Court has previously given “great deference to a trial court’s credibility determinations of expert witnesses and the weight to be given their testimony.” Wolff, 2011ND 76, ¶14. Further, this Court has held “the trial court is the best credibility evaluator in cases of conflicting testimony” and has refused to second-guess the trial court’s credibility determination. Id. Finally, this Court has explained that “a choice between two permissible views of the weight of the evidence is not clearly erroneous.” Id.

[¶15] The district court found that Johnson has “made little, if any progress in treatment, he has refused to even recognize his need for treatment or to meaningfully participate in the treatment process.” (App. p. 16, ¶25). This in spite of being placed in a group treatment program designed for individuals having lower levels of functioning. (App. 17, ¶27). The district court found Johnson has made little to no progress in the CORE treatment program designed for sex offenders. (App. 17, ¶28). The district court, relying on the testimony of Dr. Lisota, found that Johnson does not see the need for change, nor does he recognize that he has a problem. (App. 18, ¶29).

[¶16] The district court cited Dr. Lisota’s testimony that Johnson’s participation in treatment has been “superficial at best,” with Johnson believing he is entitled to a legal discharge. (App. 18, ¶30). Relying on Dr. Lisota’s testimony, the district court noted

that Johnson will not accept responsibility for his actions, a critical step required for treatment. (App. 18, ¶31). The district court further supported its findings by Dr. Lisota's testimony that Johnson denies the need for treatment, believes he is the victim in this proceeding, and has done his time and should be released. (App. 18, ¶32). The district court noted Dr. Lisota's testimony that Johnson has failed to participate in treatment "to any degree that would reduce his risk for sexual recidivism relative to when he was initially placed at NDSH." (App. 19, ¶33-34).

[¶17] The district court noted its limitations in reviewing the civil commitment of sexually dangerous individuals as set out in Section 25-03.3-17(4), N.D.C.C. The court noted that it could hold Johnson until he works his way through the treatment program, or "release [him] without treatment, and with no oversight or control, and await the outcome." (App. 21, ¶41).

[¶18] In finding that Johnson suffers from a condition which would make him likely to engage in further predatory conduct which constitutes a danger to others, the district court reiterated Johnson's failure to complete a treatment program, or to make any meaningful progress in treatment. (App. 22, ¶44). The district court found that Johnson's failure to recognize his need for treatment, and his "superficial participation" in treatment leave him in the same position he was in when he was initially committed. (App. 22-23, ¶44). The district court found that "[w]ithout treatment, Johnson remains a sexually dangerous individual who is likely to reoffend." (App. 23, ¶45).

[¶19] Johnson asserts that the district court shifted the State's burden of proof to Johnson. Appellant's Brief, ¶12. Johnson argues that the district court improperly shifted the burden of proof to Johnson, quoting the trial court's Order at paragraphs 29-

30. The trial court did not shift the burden to Johnson. The trial court stated that the burden was on the State to prove by clear and convincing evidence that Johnson remains a sexually dangerous individual. (App. p. 12, ¶13). The trial court reviewed each prong of the test to determine whether Johnson remains a sexually dangerous individual. (App. p. 13-23). The trial court reviewed the testimony that was presented regarding Johnson's participation in treatment while at the State Hospital. (App. 16-17). It was after these findings, Johnson argues, the trial court shifted the burden of proof to him. The trial court was merely reciting facts. The trial court found, based on testimony presented, that Johnson does not see a need for change or that he even has a problem, that he believes he is entitled to legal discharge, that he will not accept responsibility for his actions, that he denies any need for treatment, believes he is the victim, and has made no significant movement in sex offender treatment. (App18-19).

[¶20] This Court affirmed an order denying a petition for discharge where the district court found the respondent to have an extensive criminal history, diagnoses of a high degree of psychopathy, paraphilia, and antisocial personality disorder, and a failure to make progress in a sex offender treatment program. Interest of G.L.D., 2011 ND 52, ¶10, 795 N.W.2d 346. This Court affirmed an order denying a petition for discharge which relied, among other things, on the respondent's history of offending and on his failure to progress in treatment. In the Matter of M.D., 2012 ND 261, ¶10, 825 N.W.2d 838.

[¶21] The State is required to prove by clear and convincing evidence that Johnson remains a sexually dangerous individual. Requiring Johnson to meaningfully

participate in treatment does shift the State's burden of proof. The facts recited by the trial court support its findings that the State has met its burden.

[¶22] The trial court referenced testimony regarding the various tests and risk assessment instruments utilized to predict Johnsons' ability to control his behavior, as well as the different interpretations and opinions about the validity of the various tests for various purposes. (App. 20, ¶40). As this Court previously observed, "[t]he importance of independent judicial decision-making means the judge, rather than the test scores or the psychologists who create them, is the ultimate decision-maker." In re Hehn, 2008 ND 36, ¶21, 745 N.W.2d 631. This Court has also said that it "will not engage in a contest over percentage points in assessing actuarial tests and determining whether an individual meets the requirements for commitment for treatment as a sexually dangerous individual; rather we rely on independent judicial decision-making for the ultimate determination regarding a sexually dangerous individual." Id.

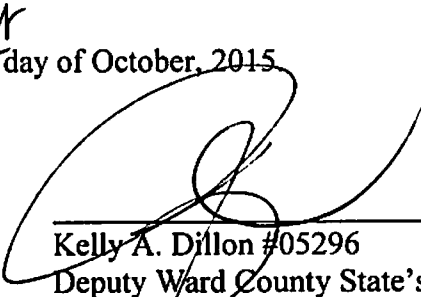
[¶23] The district court found that Johnson is likely to engage in further predatory conduct which constitutes a danger to others. (App. 22, ¶44). The district court noted that Johnson, having been adjudicated a sexually dangerous individual in need of treatment, failed to make any meaningful progress in treatment, and refuses to recognize that he is in need of treatment. (App. 22, ¶44).

[¶24] The district court found that "[t]o allow a sexually dangerous individual to simply trade time in lieu of treatment allows the patient to turn [the] notion [of civil commitment for treatment rather than punishment] on its head." (App. 23, ¶46). Finally, the district court found that, "untreated, Johnson remains a sexually dangerous individual, likely to reoffend." (App. 23, ¶47).

[¶25] CONCLUSION

[¶26] Based upon the district court's findings that Jeremy Tim Johnson remains a sexually dangerous individual, likely to reoffend, the State prays the Court affirm the district court order denying Johnson's petition for release.

Respectfully submitted this 21st day of October, 2015



Kelly A. Dillon #05296
Deputy Ward County State's Attorney
Ward County Courthouse
PO Box 5005
Minot ND 58702-5005
Telephone (701) 857-6480
51wardsa@wardnd.com
Attorney for Petitioner and Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of Jeremy Tim Johnson

Rozanna C. Larson,)	
County State's Attorney,)	
)	
Petitioner and Appellee,)	Supreme Court No. 20150217
)	
vs.)	District Court No. 51-2012-MH-00014
)	
Jeremy Tim Johnson,)	
)	
Respondent and Appellant.)	
)	

[¶27] AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

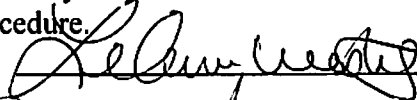
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 22 day of October, 2015, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a 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

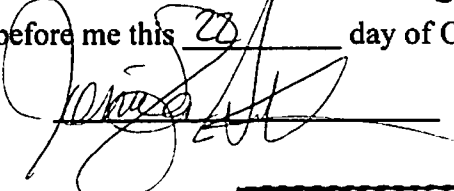
That said envelope was addressed to the following person at his address as follows:

**TYLER J. MORROW
ATTORNEY AT LAW
301 N 3RD ST STE 300
GRAND FORKS ND 58203**

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

 LeAnn Westereng

Subscribed and sworn to before me this 20 day of October, 2015, by LeAnn Westereng.

 Notary Public

**JENNIFER SCHLECHT
Notary Public
State of North Dakota
My Commission Expires April 14, 2021**