

**Supreme Court No. 20180083
District Court No. 09-07-R-237**

NORTH DAKOTA SUPREME COURT

In the Interest of Aaron Kulink

Leah J. Viste

(Petitioner and Appellee)

v.

Aaron Kulink

(Respondent and Appellant)

Appeal from the Amended Findings of Fact, Conclusions of Law, and Order Denying
Discharge issued December 7, 2018, by the Honorable Susan L. Bailey of the Cass
County District Court, East Central Judicial District

BRIEF OF THE APPELLANT

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ARGUMENT

I. [¶ 1] The District Court’s Amended Order is still insufficient pursuant to N.D.C.C. § 25-03.3 and prior cases before this Court

[¶ 2] On Remand, the District Court was tasked with attempting once again to come up with a reason or reasons to restrict Kulink’s Civil Rights for another year. Although the Amended Order contains more words and pages than the original Order, the substance remains the same. In essence, it is because a 29-year-old who had been locked up in some sort of institutional setting since the age of 16 was masturbating in the privacy of her own home.

[¶3] Kulink can be looked at as “29 going on 18.” For all intents and purposes, she is the typical recent high school graduate attempting to make it in the world and should be viewed as such. This Court has recognized substantive due process requires additional proof beyond the three statutory elements:

In addition to the three statutory requirements, to satisfy substantive due process, the State must also prove the committed individual has serious difficulty controlling his behavior. . . .

We construe the definition of a sexually dangerous individual to mean that proof of a nexus between the requisite disorder and dangerousness encompasses proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual

offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.

Wolff, 2011 ND 76, ¶7, 796 N.W.2d 644 (citations omitted). The United States Supreme Court has explained civil commitment requires a connection between the disorder and the individual's inability to control his or her actions:

"[I]nability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Kansas v. Crane, 534 U.S. 407, 413 (2002). This Court has also recognized the conduct demonstrating an individual's serious difficulty in controlling behavior need not be sexual in nature. *Wolff*, at ¶7.

[¶4] Starting at ¶8 of the Order, the district court attempts to find evidence of serious difficulty controlling behavior. Although there is a legal conclusion, the facts must be viewed to see if the State has provided clear and convincing evidence. Ironically, the district court first points to what Kulink has learned in over a decade of treatment as a basis to show serious difficulty controlling behavior, writing "In sum, Kulink has self-identified

behaviors which she recognizes as risk factors for re-offending, and throughout the review period she has continued to display these behaviors, and has not been able to modify or control her behavior.”

[¶5] This is exactly what Kulink has been taught over and over again throughout her years at the North Dakota State Hospital. To now use it as a basis to say she is unable to control her behavior is either completely illogical or, if true, means the entire treatment program is unconstitutional and this Court should end the program immediately if it believes the district court.

[¶6] But what are these egregious behaviors? “Poor hygiene and below par living condition...not having steady employment, not consistently going to work or appointments” and being “in possession of pornography and a sex toy” (Amended Order ¶9). In other words, every single freshman in college. Which again, is essentially where Kulink is in her maturation.

[¶7] Amazingly, the district court then states these behaviors are linked to her disorder. Recall, the sexual deviancy in regard to this matter is pedophilic disorder. Apparently, having a dirty room, not showering, having difficulty with employment, and masturbating is not only serious difficulty controlling behavior, but is linked to pedophilia. Conclusions are great, but facts have become very difficult in this case to justify civil commitment.

CONCLUSION

[¶ 8] Two years and four months after the initial Order placing Kulink into the community, and 11 months after the Order this Court has previously ruled was inadequate, we are now looking at an Amended Order which once again attempts to portray someone who masturbates in the privacy of her own home as having serious difficulty controlling her behavior.

[¶9] There is an attempt to claim that Kulink recognizing her sexual assault cycle, a technique taught in the treatment program, is evidence she has serious difficulty controlling her behavior. But the only actual behavior pointed to in the almost 2.5 years in the community is again what is occurring in the privacy of her own home. Accordingly, a civil commitment of Kulink can not be sustained.

Respectfully submitted this 29th day of January, 2019.

/s/
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IN THE SUPREME COURT
OF NORTH DAKOTA

In the Interest of)	
Aaron Kulink,)	# 09-07-R-237
)	# 20180083
Appellant,)	
)	
)	CERTIFICATE OF SERVICE
)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that he served a true and correct copy of the following document(s):

Appellant's Supplemental Brief

electronically through the Court Electronic Filing System to:

Leah Viste, Cass County State's Attorney, sa-defense-notices@casscountynd.gov

Dated: January 29, 2019

/s/ Tyler J. Morrow
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