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JANUARY 3, 2018
STATE OF NORTH DAKOTA

Supreme Court No. 20180278
District Court No. 08-05-R-104

NORTH DAKOTA SUPREME COURT

In the Interest of J.M.

State of North Dakota

(Petitioner and Appellee)

v.

J.M.

(Respondent and Appellant)

Appeal from the Order Denying Discharge issued July 12, 2018, by the Honorable David E. Reich of the Burleigh County District Court, South Central Judicial District

BRIEF OF THE APPELLANT

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JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to N.D.C.C. § 25-03.3-19. The Burleigh County District Court issued a decision ordering J.M. remain civilly committed on July 12, 2018. J.M. timely filed this appeal on July 17, 2018.

ISSUE PRESENTED FOR REVIEW

I. **[¶ 2] Whether the Burleigh County district court erred in determining that the State had met its burden of proving by clear and convincing evidence that J.M. remains a Sexually Dangerous Individual.**

STATEMENT OF THE CASE

[¶ 3] Petitioner filed a petition for civil commitment as a sexually dangerous individual ("SDI") on March 23, 2005. After a hearing, J.M. was initially committed to the North Dakota State Hospital ("NDSH") as an SDI on October 28, 2005.

[¶ 4] J.M exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18 on June 12, 2017. A hearing on that request was held on December 1, 2017. The Burleigh County District Court determined that the State had established by clear and convincing evidence that J.M. remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied J.M.'s discharge on July 12, 2018. J.M. appealed that decision on July 17, 2018.

STATEMENT OF THE FACTS

[¶ 5] J.M. petitioned for an annual review hearing pursuant to N.D.C.C. § 25-03.3-18 on whether he remained a sexually dangerous. A hearing was held on December 1, 2017. The State called Dr. Peter Byrne ("Byrne") to testify that J.M. remained a sexually dangerous individual subject to continued civil commitment. J.M. called Dr. Stacey Benson ("Benson") who testified that J.M. no longer met the criteria for civil commitment. The parties differed on the question of whether prong three was satisfied and whether J.M. has serious difficulty controlling his behavior.

[¶ 6] The Burleigh County District Court found that the State had proven by clear and convincing evidence that J.M. remained a sexually dangerous individual subject to continued civil commitment and issued an Order in that regard on July 12, 2018. J.M. filed his appeal on July 17, 2018.

ARGUMENT

I. [¶ 7] The District Court erred in determining the State had met its burden of proving by clear and convincing evidence that J.M. remains a Sexually Dangerous Individual.

[¶ 8] At civil commitment hearings, the State bears the burden of proving its case by clear and convincing evidence. *In re Rush*, 2009 ND 102, ¶ 9, 755 N.W.2d 720. The State must prove, by clear and convincing evidence, that an individual has previously "[e]ngaged in sexually predatory conduct, and has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder which makes that individual likely to engage in further acts of sexually predatory conduct" which comprise a danger to the physical or mental health of others. *Id.* (citing N.D.C.C. § 25-03.3-01(8)). Additionally, the State must also establish a "[c]ausal relationship or nexus between the individual's disorder and dangerousness, which indicates the individual's mental disorder is linked to an inability to control behavior, and which would therefore likely result in further sexually predatory conduct." *Id.* at ¶ 9. Establishing this nexus is absolutely necessary to differentiate between a "[d]angerous sex offender whose disorder would subject him or her to civil commitment from the 'dangerous but typical' recidivist in the ordinary criminal case. *Id.*

[¶9] This Court has determined that civil commitments of sexually dangerous individuals are reviewed under a "modified clearly erroneous" standard. *In re Midgett*, 2007 ND 198, ¶ 6, 742 N.W.2d 803, 805. The Court will affirm the district court's decision unless the "[o]rder is induced by an erroneous view of the law, or [it is] firmly convinced the order is not supported by clear and convincing evidence." *In re Anderson*, 2007 ND

50, ¶ 21, 730 N.W.2d 570. Here, the district court erred in determining the State proved by clear and convincing evidence that J.M. remains an SDI.

[¶ 10] The State must establish a "causal relationship or nexus between the individual's disorder and dangerousness, which indicates the individual's mental disorder is linked to an inability to control behavior." *In re Rush*, 2009 at ¶ 9. Both *Kansas v. Crane*, 534 U.S. 407 (2002) and N.D.C.C. §. 25-03.3 require proof of difficulty in controlling behavior by expert evidence on the record from which the district court, as the ultimate decision-maker, can conclude the individual has serious difficulty controlling his or her behavior.

[¶ 11] J.M. concedes the State has shown by clear and convincing evidence that he has engaged in sexually predatory conduct, as evidenced by previous convictions, and J.M. understands that the review of prong one at a review hearing is barred via *Res Judicata,* as this Court has previously established. *Interest of Graham*, 2013 ND 171, 837 N.W.2d 382. J.M. further 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.

[¶ 12] However, this Court previously stated, "in addition to the three requirements contained in the plain language of the statute and this Court's definition of 'likely to engage in further acts of sexually predatory conduct,' the United States Supreme Court held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior." *In re Hehn*, 2008 ND 36, ¶19, 745 N.W.2d 631. This Court further stated such a determination was required to distinguish a

sexually dangerous individual from the ordinary recidivist convicted in a typical criminal case. *Id.*

[¶13] Accordingly, the district court must state specific facts which form the basis of its legal conclusions. *Matter of R.A.S.*, 2008 ND 185, ¶ 8, 756 N.W.2d 771. The court errs as a matter of law when it fails to make sufficient findings which support its legal conclusions. *Id.* Thus, this Court "[d]efer[s] to a district court's determination that an individual has serious difficulty controlling behavior when it is supported by specific findings demonstrating the difficulty." *In re Johnson*, 2016 ND 29, ¶ 5, 876 N.W.2d 25. Simply analyzing one's criminal history is not sufficient to establish serious difficulty in controlling behavior. *Id.* at ¶ 6. Additionally, the State cannot establish serious difficulty by relying solely on an individual's progress, or lack thereof, in treatment. *Id.* at ¶ 7. While the lack of progress in treatment may be indicative of serious difficulty in controlling one's behavior, this Court has "[d]ecline[d] to infer one equals the other." *Id.*

[¶ 14] The State failed to prove by clear and convincing evidence that J.M. poses any more of a threat than the typical criminal recidivist. Instead, the State and the district court rely on a circle argument which, if affirmed, could never be defeated. That argument being that J.M. previously offended, which leads to a diagnosis, which means he will offend again. J.M. is incapable of changing his past, and to dwell thereon denies him an opportunity to ever earn his release from the NDSH. Furthermore, chapter 25-03.3 of the N.D.C.C. defines an SDI, in part, as "[a]n individual . . . *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 . . . ." (emphasis added). The present tense language of "who

has" highlights the importance of committing only individuals who presently, at the time of the hearing, remain an SDI. Relying on an individual's past history cannot establish this present-day determination.

[¶ 15] In its Order, the district court finds that the various scores found by the actuarials administered by Byrne and Benson show that Mihulka is likely to recidivate, even though this Court has determined a certain score on any instrument does not equal commitment, as such a method would make the Judiciary without purpose. *In re Hehn*, 2008 ND 36, 745 N.W.2d 631, 636. Interestingly enough, the district court understandably never weighs the credibility of Benson and Byrne while using scores which Benson used to show J.M. did not meet criteria to show that J.M. met criteria. A unique, yet extremely flawed and scientifically inaccurate approach.

[¶ 15] Moreover, the district court also found that J.M. had completed his core requirements for his sex offender treatment program and his relapse prevention plan. He would have a place to live upon discharge, and a supportive family (Order, ¶ 14). Further finding a decrease in the disciplinary incidents and the fact that incidents have not been sexual in nature (Order, ¶ 22).

CONCLUSION

[¶ 16] Under N.D.C.C. 25-03.3, at a petition for discharge hearing, the State bears the burden of proving an individual *remains* a sexually dangerous individual subject to civil commitment by clear and convincing evidence. This requires a present-day determination of sexual dangerous. The district court relied heavily on the scoring of actuarials, when this Court has said these hearings are not a contest over actuarial scores. The legal equivalent of having your cake and eating it too. If the standard is a high enough score equals likely, then a low enough score must mean one cannot be committed. The district court's Order completely lacks any attempt to even try and weigh the testimony and credibility of Byrne and Benson. Instead, the district court uses instruments that Byrne used to say J.M. met criteria combined with instruments Benson used to say J.M. did not meet criteria in a completely discombobulated method to come up with a conclusory determination that J.M. meets criteria as an SDI.

[¶ 17] Based on the arguments set forth, but mainly the evidence in this case, it is apparent that the State failed to meet its burden. The district court erred in determining that there was clear and convincing evidence that J.M. remains a sexually dangerous individual. J.M. respectfully requests this Court reverse the decision of the district court and grant J.M. his immediate release.

Respectfully submitted this 3rd day of January 2019.

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OF NORTH DAKOTA

State of North Dakota,	)	
	)	**#08-05-R-104**
Appellee,	)	**#20180278**
	)	
VS.	)	
	)	**CERTIFICATE OF SERVICE**
J.M.,	)	
	)	
	)	
Appellant.	)	

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 Brief
Appellant's Appendix

Electronically through the Court Electronic Filing System to:

Julie Lawyer, Assistant State's Attorney, bc08@nd.gov

Dated: January 3, 2019.

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