20180374
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 22, 2019
STATE OF NORTH DAKOTA

Supreme Court No. 20180374
District Court No. 08-05-R-32

NORTH DAKOTA SUPREME COURT

In the Interest of T.G.

State of North Dakota

(Petitioner and Appellee)

v.

T.G.

(Respondent and Appellant)

Appeal from the Order Denying Discharge issued October 17, 2018, by the Honorable John Grinsteiner of the Burleigh County District Court, South Central Judicial District

BRIEF OF THE APPELLANT

Tyler J. Morrow
Attorney for Appellant
ND #06923
Kraus-Parr, Morrow, and Weber
424 Demers Avenue
Grand Forks, ND 58201
Ph.: (701) 772-8991
tyler@kpmwlaw.com

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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 T.G. remain civilly committed on October 17, 2018. T.G. timely filed this appeal on October 23, 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 T.G. remains a Sexually Dangerous Individual.**

II. **[¶ 3] Whether the continued commitment of T.G. is Constitutional.**

STATEMENT OF THE CASE

[¶ 4] Petitioner filed a petition for civil commitment as a sexually dangerous individual ("SDI") on February 1, 2005. After a hearing, T.G. was initially committed to the North Dakota State Hospital ("NDSH") as an SDI on September 29, 2005.

[¶ 5] T.G. exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18 on February 17, 2017. A hearing on that request was held on September 7, 2018. The Burleigh County District Court determined that the State had established by clear and convincing evidence that T.G. remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied T.G.'s discharge on October 17, 2018. T.G. appealed that decision on October 23, 2018.

STATEMENT OF THE FACTS

[¶ 6] T.G. 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 September 7, 2018. The State called Dr. Erik Fox ("Fox") to testify that T.G. remained a sexually dangerous individual subject to continued civil commitment.

[¶ 7] When Fox was asked what sex offender treatment T.G. had not yet completed at the NDSH, Fox's answer was, "Well, that I don't know" (Transcript page 40; line 24). When T.G. was asked what treatment he had not yet completed at the NDSH, his answer was, "Not a thing" (Transcript page 52; line 7).

[¶ 8] The Burleigh County District Court found that the State had proven by clear and convincing evidence that T.G. remained a sexually dangerous individual subject to continued civil commitment and issued an Order in that regard on September 17, 2018. T.G. filed his appeal on September 23, 2018.

ARGUMENT

I. [¶ 9] The District Court erred in determining the State had met its burden of proving by clear and convincing evidence that T.G. remains a Sexually Dangerous Individual.

[¶ 10] 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.*

[¶11] 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 T.G. remains an SDI.

[¶12] 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.

[¶ 13] T.G. concedes the State has shown by clear and convincing evidence that he has engaged in sexually predatory conduct, as evidenced by previous convictions, and T.G. 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. T.G. 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.

[¶ 14] 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.*

[¶15] 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.*

[¶ 16] The State failed to prove by clear and convincing evidence that T.G. 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 T.G. previously offended, which leads to a diagnosis, which means he will offend again. T.G. 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.

[¶ 17] In its Order, the district court finds that the various scores found by the actuarials administered by Fox show that T.G 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.

II. [¶ 18] Continued Commitment of T.G. is Unconstitutional

[¶ 19] At the Review Hearing, Fox was unable to testify where T.G. was currently at in treatment. T.G.'s testimony was that he has completed the entire treatment program at the NDSH. Thus, the factual record before this Court is that T.G. has completed treatment at the NDSH.

[¶ 20] In its closing, the state argued, "regardless of the fact that he may have gone through all of the treatment that's available... (Transcript page 54; Lines 8-9), and "[j]ust the fact that he's completed all of the assignments that are required for the treatment program...(Transcript page 52; Lines 16-17)" showing that the state concedes it is entirely possible T.G. has completed all treatment assignments at the NDSH.

[¶21] The facts presented to the district court and the concession by the state becomes vital in determining the Constitutionality of the continued commitment of T.G. This Court has previously determined that civil commitment must be for treatment and treatment alone. In examining the Constitutionality of the SDI statute, this Court wrote, "Our North Dakota statute, like the statute at issue in Allen, focuses on treatment and predicting future behavior." *Interest of Maedche*, 2010 ND 171, 788 N.W.2d 331. This requires an analysis as to T.G.'s current treatment program, which the record indicates he has completed.

[¶22] In the dissent in Whitetail, Justice Kapsner wrote, "[Kansas v. Hendricks, 521 U.S. 346 (1997)] underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or

general deterrence"-- functions properly those of criminal law, not civil commitment." *Interest of Whitetail*. 2013 ND 143, 835 N.W.2d 827. The record before the Court shows that treatment is no longer even considered when determining whether to civilly commit an individual. As such, when applied to T.G., the statue has become punitive, and thus criminal, in nature, and is no longer Constitutional.

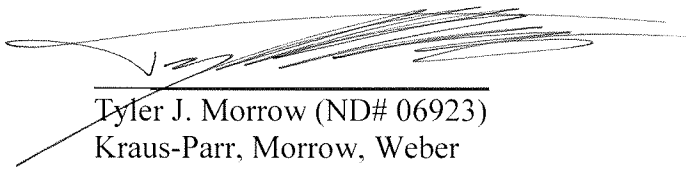
CONCLUSION

[¶23] 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 record is void of clear and convincing evidence showing an inability to control behavior over the review period.

[¶24] If this Court finds the district court's finding is supported by clear and convincing evidence, the factual record presented by the state at the hearing does not pass Constitutional scrutiny. The record before the Court is that T.G. has completed all his treatment at the NDSH, and therefore any further confinement is punitive.

[¶25] Based on the arguments set forth, the State has failed to meet its burden. The district court erred in determining that there was clear and convincing evidence that T.G. remains a sexually dangerous individual. Even if the findings are supported by clear and convincing evidence, the fact that the record presented is that T.G. has completed treatment makes any continued commitment of T.G. Unconstitutional. T.G. respectfully requests this Court reverse the decision of the district court and grant T.G. his immediate release.

Respectfully submitted this 22nd day of January 2019.



Tyler J. Morrow (ND# 06923)
Kraus-Parr, Morrow, Weber
424 Demers Ave
Grand Forks, ND 58201
Telephone: (701) 772-8991
tyler@kpmwlaw.com
Attorney for Respondent-Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20180374
Appellee,	)	Case No. 08-05-R-0032
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	
	)	
T[redacted] A[redacted] G[redacted],	)	
	)	
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 email to:

Marina Spahr, Assistant State's Attorney, bc08@nd.gov

Dated: January 22, 2019.

/s/ Tyler J. Morrow
Tyler J. Morrow (ND #06923)
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58203
T: (701) 772-8991
F: (701) 795-1769
tyler@kpmwlaw.com
Attorney for Appellant