

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of: T.A.G.	)	
	)	
State of North Dakota,	)	
	)	
Petitioner-Appellee,	)	
	)	
-vs-	)	
	)	
T.A.G.,	)	Supreme Ct. No. 20180374
	)	
Respondent-Appellant	)	District Ct. No. 08-05-R-32

**BRIEF OF PETITIONER-APPELLEE**

Appeal from Order Denying Discharge filed on October 17, 2018

Burleigh County District Court  
South Central Judicial District  
The Honorable John Grinsteiner, Presiding

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**TABLE OF CONTENTS**

	<u>Paragraph No.</u>
Table of Authorities .....	Page i
Statement of the Issues.....	¶ 1
Statement of the Case.....	¶ 3
Statement of the Facts.....	¶ 6
Argument .....	¶ 12
Conclusion .....	¶ 23

**TABLE OF AUTHORITIES**

Paragraph No.

**Cases**

In re G.R.H.

2006 ND 56, 711 N.W.2d 587 ..... ¶¶ 15, 16

In re Graham

2013 ND 171, 837 N.W.2d 382 ..... ¶ 14

In re J.T.N.

2011 ND 231, 807 N.W.2d 570 ..... ¶¶ 13, 17

In re Mangelsen

2014 ND 31, 843 N.W.2d 8 ..... ¶ 13

**STATEMENT OF THE ISSUES**

- [¶1] I. Whether the district court properly determined that T.A.G. remains a sexually dangerous individual.
  
- [¶2] II. Whether the continued commitment of T.A.G. is constitutional.

### STATEMENT OF THE CASE

[¶3] A petition alleging T.A.G., the respondent, is a sexually dangerous individual was filed on February 1, 2005. (Appellant's Appendix ("App." p. A1). A hearing was held on September 27, 2005 and T.A.G. was found to be a sexually dangerous individual. (App. p. A2). Findings of Fact and Order for Commitment was filed on September 29, 2005. (Id.).

[¶4] T.A.G. requested a discharge hearing on February 17, 2017. (App. p. A11). T.A.G. further requested the appointment of an independent examiner. (Id.). Dr. Gregory Volk was appointed as an independent examiner for Mr. Greak by order dated May 11, 2017. (Id.). A hearing was held on September 7, 2018. (App. p. A12). The State's expert, Dr. Erik Fox, and T.A.G. testified at the hearing. (Transcript of Discharge Hearing ("Tr.") p. 2). Dr. Gregory Volk did not testify. (Id.). The District Court found that T.A.G. remains a sexually dangerous individual. (App. p. A12). Findings of Fact, Conclusions of Law, and Order for Commitment was filed on October 17, 2018. (App. p. A13, A14-A17).

[¶5] T.A.G. filed a timely notice of appeal on October 23, 2018. (App. p. A13, A18).

## STATEMENT OF THE FACTS

[¶6] At the hearing on September 7, 2018, T.A.G. stipulated to the fact that he has engaged in sexually predatory conduct. (Tr. pp. 3-4).

[¶7] The State's expert, Dr. Eric Fox, testified that T.A.G. declined to participate in an interview but that a records review was done to complete an evaluation and report. (Tr. p. 7). Upon review of the records, Dr. Fox testified that he diagnosed T.A.G. with a Paraphilic diagnosis, an exhibitionistic disorder and a personality disorder, Antisocial Personality Disorder. (Tr. p. 7).

[¶8] Dr. Fox testified based on the sexual offending of over twenty arrests over two decades and eight states, he found a nexus between the Antisocial Personality Disorder and the criminal sex acts T.A.G. has committed. (Tr. p. 11). In determining whether those diagnoses render T.A.G. likely to engage in further acts of sexually predatory conduct, Dr. Fox stated that he reviewed actuarial instruments which examine static and dynamic factors to assist in determining future risk of sexually reoffending. (Tr. pp. 11-14). Dr. Fox also used an instrument, the SVR-20, to identify treatment targets and ability to control behavior in those areas. (Tr. p. 16). He also scored T.A.G. on the psychopathy checklist which does not necessarily identify sexual recidivism but is an exacerbating factor when taken together with the other risk assessments. (Tr. p. 17). T.A.G. scored as highly psychopathic. (Id.). Based on the records and the assessments, Dr. Fox opined that T.A.G. was likely engage in further acts of sexually predatory conduct. (Tr. p. 17-18).

[¶9] Dr. Fox testified that T.A.G. hasn't really progressed in treatment at all. (Tr. p. 13). According to Dr. Rodlund, T.A.G.'s primary treatment provider, T.A.G. will progress in treatment for a few months and then regress and get demoted. (Tr. p. 14; SDI Annual Evaluation Report, Index #290 ("Eval") p. 61). Per the report, T.A.G. was in a group treatment with Dr. Rodlund for two hours a day, five days a week. (Eval. P. 61). T.A.G. had been demoted to Level 1 treatment in September, 2017 and had been promoted again to Level II in June, 2018. (Tr. p. 14). He had been demoted due to making a sexual comment towards staff, along with three other behavioral issues. (Tr. p. 15). T.A.G. testified that he did not make any sexual comments towards staff. (Tr. pp. 52-53). T.A.G. also acknowledged that he was at Level II treatment but was "two months away from going to Level III". (Tr. p. 53).

[¶10] In order to determine if T.A.G. has serious difficulty controlling his behavior, Dr. Fox looked at T.A.G.'s behavior within the program and the level of treatment that he was in. (Tr. p. 18). Dr. Fox noted the behavioral issues, manipulation of staff, the aggressive verbal tone, the demotion in treatment, all as examples of serious difficulty controlling behavior. (Id.). Dr. Fox also spoke with the primary treatment provider, Dr. Rodlund, just prior to the hearing and also reviewed updated records for a period of six months preceding the hearing. (Tr. p. 21). While T.A.G. was promoted in treatment and made some behavioral improvements during that time, there was no change in Dr. Fox's opinion as to whether T.A.G. is likely to reoffend due to his diagnoses or has serious difficulty controlling his behavior. (Id.).

[¶11] The District Court found that T.A.G. remains a sexually dangerous individual and ordered continued commitment at the North Dakota State Hospital. (App. pp. A13-A17).



## ARGUMENT

[¶12] **I. Whether the district court properly determined that T.A.G. remains a sexually dangerous individual.**

[¶13] The standard of review that applies to commitments of sexually dangerous individuals is “modified clearly erroneous”. In re J.T.N., 2011 ND 231, ¶6, 807 N.W.2d 570. This Court will affirm the trial court’s order unless the order was based upon an erroneous view of law or there was not clear and convincing evidence that the respondent remains a sexually dangerous individual. Id. This Court gives great deference to the trial court’s credibility determinations and will not second-guess them. Id. At a review hearing, the State must prove by clear and convincing evidence that the respondent remains a sexually dangerous individual. Id. at ¶4. The State must prove that the respondent 1) has engaged in sexually predatory conduct; 2) has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction; 3) is likely to engage in further acts of sexually predatory conduct which constitutes a danger to others due to their condition; and 4) has serious difficulty controlling behavior. In re Mangelsen, 2014 ND 31, ¶ 7, 843 N.W.2d 8.

[¶14] At the hearing, the only expert witness to testify was the State’s expert, Dr. Erik Fox. (Tr. p. 2). T.A.G.’s court-appointed independent expert, Dr. Gregory Volk, did not testify, nor did any other expert on his behalf. (Tr. p. 2). Once sexually predatory conduct has been established at an initial hearing on commitment, *res judicata* bars relitigation of that issue. In re Graham, 2013

ND 171, ¶ 12, 837 N.W.2d 382. T.A.G. stipulated to the fact that he has engaged in sexually predatory conduct. (Tr. pp. 3-4).

[¶15] Dr. Fox testified that T.A.G. declined to participate in an interview but that a records review was done to complete an evaluation and report. (Tr. p. 7). Clear and convincing evidence at the hearing must be presented to support a diagnosis of a sexual disorder or personality disorder. In re G.R.H., 2006 ND 56, ¶ 9, 711 N.W.2d 587. Upon review of the records, Dr. Fox testified that he diagnosed T.A.G. with a Paraphilic diagnosis, an exhibitionistic disorder and a personality disorder, Antisocial Personality Disorder. (Tr. p. 7). T.A.G. presented no contrary evidence to dispute the diagnosis. (See generally, Tr.).

[¶16] The State must then prove there is a nexus between the disorder and future risk of sexually predatory conduct which constitute a danger to others. In re G.R.H., 2006 ND 56, ¶ 16, 711 N.W.2d 587. Dr. Fox testified based on the sexual offending of over twenty arrests over two decades and eight states, he found a nexus between the Antisocial Personality Disorder and the criminal sex acts T.A.G. has committed. (Tr. p. 11). In determining whether those diagnoses render T.A.G. likely to engage in further acts of sexually predatory conduct, Dr. Fox stated that he reviewed actuarial instruments which examine static and dynamic factors to assist in determining future risk of sexually reoffending. (Tr. pp. 11-14). Dr. Fox also used an instrument, the SVR-20, to identify treatment targets and ability to control behavior in those areas. (Tr. p. 16). He also scored T.A.G. on the psychopathy checklist which

does not necessarily identify sexual recidivism but is an exacerbating factor when taken together with the other risk assessments. (Tr. p. 17). T.A.G. scored as highly psychopathic. (Id.). Based on the records and the assessments, Dr. Fox opined that T.A.G. was likely engage in further acts of sexually predatory conduct. (Tr. p. 17-18).

[¶17] The State must then prove that the respondent has serious difficulty controlling his behavior. In re J.T.N., 2011 ND 231, ¶ 13, 807 N.W.2d 570. In doing so, all relevant conduct may be considered. Id. Dr. Fox testified that T.A.G. hasn't really progressed in treatment at all. (Tr. p. 13). According to Dr. Rodlund, T.A.G.'s primary treatment provider, T.A.G. will progress in treatment for a few months and then regress and get demoted. (Tr. p. 14; SDI Annual Evaluation Report, Index #290 ("Eval") p. 61). Per the report, T.A.G. was in a group treatment with Dr. Rodlund for two hours a day, five days a week. (Eval. P. 61). T.A.G. had been demoted to Level I treatment in September, 2017 and had been promoted again to Level II in June, 2018. (Tr. p. 14). He had been demoted due to making a sexual comment towards staff, along with three other behavioral issues. (Tr. p. 15). T.A.G. testified that he did not make any sexual comments towards staff. (Tr. pp. 52-53). T.A.G. also acknowledged that he was at Level II treatment but was "two months away from going to Level III". (Tr. p. 53).

[¶18] In order to determine if T.A.G. has serious difficulty controlling his behavior, Dr. Fox looked at T.A.G.'s behavior within the program and the level of treatment that he was in. (Tr. p. 18). Dr. Fox noted the behavioral

issues, manipulation of staff, the aggressive verbal tone, the demotion in treatment, all as examples of serious difficulty controlling behavior. (Id.). Dr. Fox also spoke with the primary treatment provider, Dr. Rodlund, just prior to the hearing and also reviewed updated records for a period of six months preceding the hearing. (Tr. p. 21). While T.A.G. was promoted in treatment and made some behavioral improvements during that time, there was no change in Dr. Fox's opinion as to whether T.A.G. is likely to reoffend due to his diagnoses or has serious difficulty controlling his behavior. (Id.).

[¶19] T.A.G. did not offer any evidence to dispute the findings of Dr. Fox, nor did he call an expert witness to refute any of Dr. Fox's findings. Dr. Fox's testimony and report provided the district court with sufficient evidence to find that T.A.G. remains a sexually dangerous individual.

[¶20] **II. Whether the continued commitment of T.A.G. is constitutional.**

[¶21] T.A.G. basically argues that he has completed the treatment at the State Hospital so any further commitment is punitive and is unconstitutional since the purpose of commitment as a sexually dangerous individual is to provide the person with treatment. T.A.G. testified that he has completed treatment at the State Hospital. (Tr. p. 52). He argues because of his testimony "the factual record before this Court is that T.G. has completed treatment at the NDSH." (Appellant's Brief ¶ 19). T.A.G. is ignoring the testimony of Dr. Fox that, at the time of the hearing, T.A.G. had progressed from Level I to Level II of the three-level treatment program at the State Hospital. (Tr. pp. 14-15).

T.A.G. himself indicated that he was within months of progressing to Level III of the treatment program. (Tr. p. 53).

[¶22] The record was also clear that Dr. Rodlund, T.A.G.'s primary treatment provider, was still providing treatment to T.A.G. and that T.A.G. was continuing to progress and regress through the treatment program. (Tr. p. 14; Eval. p. 61). Other than T.A.G.'s statements that he had completed all treatment at the State Hospital, there was no other testimony that he had. In fact, all other testimony was contrary to T.A.G.'s assertion. T.A.G. continues in treatment at the State Hospital and further commitment is for treatment purposes and not punitive.

### CONCLUSION

[¶23] Based upon the foregoing, the State respectfully requests that the order denying discharge filed on October 17, 2018 be affirmed.

Dated this 22nd day of March, 2019.



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STATE OF NORTH DAKOTA                 )  
  ) ss  
COUNTY OF BURLEIGH                    )


Gwen Tardif, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 22nd day of March, 2019, I sent via electronic mail a true copy of the attached:

- 1. Brief of Petitioner-Appellee
- 2. Affidavit of Mailing

addressed to:

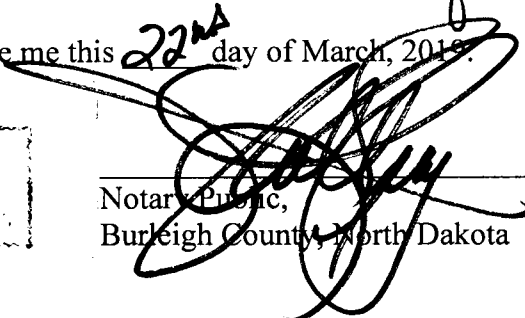
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which address is the last known address of the addressee.

  
\_\_\_\_\_  
Gwen Tardif

Subscribed and sworn to before me this 22nd day of March, 2019.

**MICHELLE E. LEARY**  
Notary Public  
State of North Dakota  
My Commission Expires December 31, 2019

  
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Notary Public,  
Burleigh County, North Dakota