

**Supreme Court No. 20190015
District Court No. 47-2010-MH-113**

NORTH DAKOTA SUPREME COURT

In the Interest of Lawrence Didier

State of North Dakota
(Petitioner and Appellee)

v.

Lawrence Didier

(Respondent and Appellant)

Appeal from the Findings of Fact, Conclusions of Law, and Order Denying Discharge issued
February 14, 2019, by the Honorable Cherie Clark of the Stutsman County District Court,
Southeast 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 Stutsman County District Court issued a decision ordering Didier remain civilly committed on January 14, 2019. Didier timely filed this appeal on January 16, 2019.

ISSUES PRESENTED FOR REVIEW

- I. [¶ 2] Whether Didier was given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.
- II. [¶ 3] Whether the District Court's Order's factual basis regarding Didier's behavior is sufficient to legally conclude Didier has an inability to control his behaviors.

STATEMENT OF THE CASE

[¶ 4] Petitioner filed a petition for civil commitment as a sexually dangerous individual (“SDI”) on May 19, 2010. After a hearing, Didier was initially committed to the North Dakota State Hospital (“NDSH”) as an SDI on November 15, 2010.

[¶ 5] Didier exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. A hearing on that request was held on January 11, 2019. The Stutsman County District Court determined that the state had established by clear and convincing evidence that Didier remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied Didier’s discharge on January 14, 2019. Didier appealed that decision on January 16, 2019.

STATEMENT OF THE FACTS

[¶ 6] Didier 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 January 9, 2019. The state called Dr. Deirdre D'Orazio ("D'Orazio") to testify that Didier remained a sexually dangerous individual subject to continued civil commitment.

[¶ 7] The annual evaluation completed by D'Orazio was filed as an exhibit with the district court (Index #114). The exhibit itself is void of what facts go towards forming the legal conclusion that Didier has an inability in controlling his behaviors. On cross-examination, when asked when Didier has demonstrated a lack of volitional control during the review period, D'Orazio stated, "...I don't know of any examples where Mr. Didier has acted out violently or sexually during that period (Transcript pages 49-50; lines 25-1)." D'Orazio further discussed Didier's behavior from the time the report was complete until the hearing, stating, "...the therapist did not provide any information that there's been volitional deficits manifested from the time my report ended to yesterday (Transcript page 50; lines 12-15)." Later during cross examination, D'Orazio stated, "He (Didier) hasn't had behavior problems (Transcript page 55; line 15)."

[¶ 8] The Stutsman County District Court found that the State had proven by clear and convincing evidence that Didier remained a sexually dangerous individual subject to continued civil commitment and issued an Order in that regard on January 14, 2019. Didier filed his appeal on January 16, 2019. The Order pointed out "that previous cases may have had more instances of recent conduct exhibiting an inability to control behavior (¶27)" and that "Respondent's experienced and astute attorney accurately argued that the State did not produce a single witness from the State Hospital to give more specifics on Didier's behavior (¶28).

ARGUMENT

I. [¶ 9] Didier was not given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.

[¶ 10] This Court has previously determined the right to a fair hearing comporting with due process includes reasonable notice or opportunity to know of the claims of opposing parties and the opportunity to rebut them. Flink v. North Dakota Workers Compensation Bureau, 1998 ND 11, ¶16, 574 N.W.2d 784.

[¶ 11] In this case, although Didier was provided with an evaluation by D’Orazio which indicated her professional conclusion that he met the criteria, it does not include the facts which support the conclusion that Didier has difficulty controlling his behavior. Additionally, her testimony was that “He (Didier) hasn’t had behavior problems (Transcript page 55; line 15).” The state’s contention in closing was that the scores used to determine likeliness in prong three were also clear and convincing evidence of prong four or the volitional control element being met (Transcript page 77; lines 6-12). The district court did not find that argument persuasive, and this Court has never found that argument to be the standard in these proceedings as well. The record is void of any facts the state offered to form the legal conclusion that Didier has difficulty controlling his behavior. As such, Didier was not afforded a fair hearing as there were no factual claims to rebut.

III.[¶ 12] The District Court's Order's factual basis regarding Didier's behavior is insufficient to legally conclude Didier has an inability to control his behaviors.

[¶ 13] 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's order is not supported by clear and convincing evidence that Didier has an inability to control his behavior.

[¶ 14] This Court previously analyzed the volitional control prong in *Johnson*,

We defer 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 *G.L.D.*, we upheld a finding of serious difficulty controlling behavior when the individual frequently assaulted staff and his peers. 2011 ND 52, ¶ 7, 795 N.W.2d 346. In *Wolff*, we upheld a finding of serious difficulty when the individual yelled profanities, had an explosive temper, refused to attend treatment, and acted in a sexual manner with a peer. 2011 ND 76, ¶9, 796 N.W.2d 644. In *Matter of M.D.*, we upheld a finding of serious difficulty when the individual had engaged in a sexual relationship with a peer and stated he would take advantage of a minor if he knew he would not be caught, would use drugs if they were offered to him, and would provide oral sex if someone came to his door and wanted it. 2012 ND 261, ¶ 10, 825 N.W.2d 838.

In the Interest of Johnson, 2016 ND 29, 876 N.W.2d 25.

[¶ 15] The district court accurately pointed out that this Court has found past conduct to have some relevance in determining difficulty controlling behavior. *In the Interest of Voisine*, 2018 ND 181, 915 N.W.2d 647. However, based upon the state's complete lack of facts offered in the evaluation or on direct testimony, the entirety of the evidence resides in past conduct or conduct that neither the state itself nor the state's expert witness offered as a factual basis to meet this element. This goes back to issue one in that there was no opportunity to rebut the state's factual claims as it made no factual claims.

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 record is void of clear and convincing evidence showing difficulty controlling behavior over the review period.

[¶ 17] 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 Didier remains a sexually dangerous individual. Didier respectfully requests this Court reverse the decision of the district court and grant Didier his immediate release.

Respectfully submitted this 3rd day of May, 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,)	
)	#47-2010-MH-113
Appellee,)	#20190015
)	
VS.)	
)	CERTIFICATE OF SERVICE
Lawrence Didier,)	
)	
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:

Fredrick Fremgren, Stutsman County State's Attorney, attorney@stutsmancounty.gov

Dated: May 3, 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