

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interests of O.H.W.)	
)	
State of North Dakota,)	Supreme Court No. 20190137
)	District Court No. 09-04-R-00904
Petitioner and Appellee,)	
)	
vs.)	
)	
O.H.W.,)	
)	
Respondent and Appellant.)	

APPELLEE’S BRIEF

Appeal from the Findings of Fact, Conclusions of Law, and Order Denying Discharge issued April 18, 2019, by the Honorable Stephannie N. Stiel presiding, Cass County District Court, East Central Judicial District

Leah J. Viste, NDID #05692
Assistant State’s Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Plaintiff-Appellee

Emily Jo Christensen
Law Clerk
Certified under R. Ltd.
Practice of Law by Law Students

[¶ 1] TABLE OF CONTENTS

	<u>Paragraph No.</u>
Table of Contents	¶ 1
Table of Authorities.....	¶ 2
Jurisdictional Statement.....	¶ 3
Statement of Issue.....	¶ 5
Statement of Case	¶ 7
Statement of Facts	¶ 9
Standard of Review	¶ 11
Law and Argument.....	¶ 13
I. Whether the District Court properly determined that O.H.W. remains a sexually dangerous individual	¶ 14
Conclusion.....	¶ 27
Certificate of Service.....	¶ 30
Certificate of Compliance.....	¶ 32

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

Statutes:

N.D.C.C. § 25-03.3-01(8) ¶ 15

State Cases:

In re Graham, 2013 ND 171, 837 N.W.2d 385 ¶ 21

In re J.T.N., 2011 ND 231, 807 N.W.2d 570 ¶ 12, 21

Interest of Carter, 2019 ND 67, 924 N.W.2d 112 ¶ 16

Interest of G.L.D., 2011 ND 152, 795 N.W.2d 346 ¶ 22

Interest of R.A.S., 2019 ND 169 ¶ 17, 21, 22

Interest of Voisine, 2018 ND 181, 915 N.W.2d 647 ¶ 21

Kansas v. Crane, 534 U.S. 407 (2002) ¶ 16

Matter of M.D., 2012 ND 261, 825 N.W.2d 838 ¶ 22

Matter of Wolff, 2011 ND 76, 796 N.W.2d 644 ¶ 22

[¶ 3] JURISDICTIONAL STATEMENT

[¶ 4] The State agrees with the Respondent's Jurisdictional Statement.

[¶ 5] STATEMENT OF ISSUE

[¶ 6] Whether the District Court properly determined that O.H.W. remains a sexually dangerous individual.

[¶ 7] STATEMENT OF CASE

[¶ 8] The State agrees with the Respondent's Statement of the Case.

[¶ 9] STATEMENT OF FACTS

[¶ 10] The State agrees with the Respondent's Statement of Facts.

[¶ 11] STANDARD OF REVIEW

[¶ 12] 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 reaffirm 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 court's credibility determinations of expert witnesses and the weight given to their testimony and will not second-guess them. Id.

[¶ 13] **LAW AND ARGUMENT**

[¶ 14] **The District Court properly determined that O.H.W. remains a sexually dangerous individual.**

[¶ 15] To be committed as a sexually dangerous individual, a person must meet three statutory elements:

(1) The individual has engaged in sexually predatory conduct, (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction, and (3) the individual's condition makes [the individual] likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.

N.D.C.C. § 25-03.3-01(8)

[¶ 16] In addition to the statutory requirements, the State must also prove the committed individual has serious difficulty controlling his behavior. Interest of Carter, 2019 ND 67, ¶ 4, 924 N.W.2d 112. The Supreme Court explained, “although not mathematically precise, the proof of inability to control behavior...must be sufficient to distinguish the dangerous sexual offense whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” Id. (citing Kansas v. Crane, 534 U.S. 407, 413 (internal citations omitted)).

[¶ 17] At the discharge hearing, Defendant conceded that the State has met prongs 1 and 2. (Tr. p. 66). The State must then prove there is a nexus between the requisite disorder and dangerousness to encompass 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. Interest of R.A.S., 2019 ND 169, ¶ 5.

[¶ 18] In this case, Dr. Fox testified O.H.W. is still likely to engage in predatory conduct if released. (Tr. p. 12). Dr. Fox testified to a series of tests conducted on O.H.W. to form his conclusion. (See generally, Tr.). O.H.W. received a score of 5 on the Static-99, which detects the rate of recidivism for individuals with a same or similar score. (Tr. p. 12). A score of 5 places O.H.W. in the above-average risk level. (Tr. p. 13). Dr. Fox added that the Static-99 produces underestimations of true recidivism rates because it only captures those individuals that were reported and ultimately arrested; therefore providing us with very conservative estimates of individuals with a score of 5. (Tr. p. 13).

[¶ 19] The next assessment test used by Dr. Fox was the SRA-FV, which looks at dynamic risk factors. (Tr. p. 15). O.H.W. is in the higher risk/high needs group based on additional dynamic factors that are measured outside of the Static-99, including sexual interest in children, his sexual preoccupation, his callousness, his internal grievance thinking, his poorly managed anger, his resistance to rules and supervision, and his dysfunctional coping over the years. (Tr. pp. 15-16). Dr. Fox discussed the Psychopathy Checklist used to determine O.H.W. scored a 24, the last number available in the moderate range for psychopathy. (Tr. p. 17). According to

Dr. Fox, a score of 24 represents the extreme level of the antisocial personality disorder where we see an entrenched, self-serving, narcissistic, and antisocial lifestyle of an individual, which demonstrates a lack of care or concern for others, lawlessness, a lack of recognition of the likely consequences of one's behavior or lack of consideration for the likely consequences. (Tr. pp. 17-18). Lastly, Dr. Fox testified to the SVR-20, which is a test used to identify how challenging somebody might be from a treatment standard. (Tr. p. 19). Dr. Fox found a high density of factors present, 15 of the 20 factors. Id. Those factors represent the challenges O.H.W. would have in completing or succeeding in treatment. Id. That was confirmed when Dr. Fox spoke with O.H.W.'s treatment provider. Id.

[¶ 20] Most importantly, Dr. Fox explained how the results of the tests correlate with the density and diversity of offending by O.H.W. (Tr. p. 20). O.H.W. has three different detections and sanctions for sexual offenses, identifying a fairly prolific or highly repetitive offender and a diverse victim pool – children, adults, male, and female. (Tr. p. 20). Dr. Fox testified that the use of violence and coercion with his victims was present and his current minimization of the offenses is notable. (Tr. pp. 20-21) O.H.W. initially denied he committed the offenses, then acknowledged he did them, and is now entrenched, again, in his denial. (Tr. p. 21). This minimization, coupled with his test scores, and a lack of discharge planning and plan for reintegration, support Dr. Fox's conclusion that there is a present risk of future predatory conduct.

[¶ 21] Finally, 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. This requirement looks at “whether a person may change with the passage of time and adherence to treatment.” In re Graham, 2013 ND 171, ¶ 14, 837 N.W.2d 385. However, the conduct evidencing the individual’s serious difficulty in controlling his behavior does not have to be sexual in nature. R.A.S., 2019 ND 169 at ¶ 5. Further, the North Dakota Supreme Court has recently said that when determining if an individual has serious difficult controlling their behavior, past conduct has some relevance. Interest of Voisine, 2018 ND 181, ¶ 18, 915 N.W.2d 647, 654-55. Prior write-ups, demonstrating a unwillingness to follow rules in a highly-structured setting, and lack of progress in treatment can show that an individual continues to have serious difficulty controlling behavior. Id.

[¶ 22] A district court’s finding that an individual has serious difficulty controlling behavior is deferred to when it’s supported by specific findings demonstrating the difficulty. R.A.S., 2019 ND 169 at ¶ 9. See Interest of G.L.D., 2011 ND 152, ¶ 7, 795 N.W.2d 346 (serious difficulty controlling behavior existed when the individual frequently assaulted staff and peers); Matter of Wolff, 2011 ND 76, ¶ 9, 796 N.W.2d 644 (serious difficulty controlling behavior existed when the individual yelled profanities, had an explosive temper, refused to attend treatment, and acted sexually with a peer); Matter of M.D., 2012 ND 261, ¶ 10, 825 N.W.2d

838 (serious difficulty controlling behavior existed when individual engaged in a sexual relationship with a peer, 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).

[¶ 23] At the discharge hearing, Dr. Fox testified that O.H.W. would still have serious difficulty controlling his behavior. (Tr. p. 22). Dr. Fox discussed O.H.W.'s write-ups – including 77 during his last prison term, 33 between 2015 and 2016, and 12 in the past two years, some of which were violent in nature. (Tr. pp. 49-50). These violent crimes included hitting a wall, calling someone a “bitch,” hitting a display case while calling someone a “fucking idiot,” and having a list of people’s names which was considered contraband. (Tr. p. 50).

[¶ 24] Dr. Fox testified that over the last year, O.H.W. is still quite argumentative, lashes out verbally, still demonstrates sexual compulsivity, and has been ordering from pen-pal magazine, which has been determined to be contraband. (Tr. p. 22) (Emphasis added). O.H.W.'s issue with ordering from pen-pal contraband has been active since 2016. (Tr. p. 50). Other factors considered by Dr. Fox included O.H.W.'s recent lack of accountability for his contraband, his resistance to treatment, his choices involving attendance and participation, and a lack of motivation or insight into the treatment concepts. (Tr. p. 22). Dr. Fox testified that the lack of insight limits his ability to recognize and identify warning signs, red flags, and create a good relapse-prevention plan. (Tr. p. 25). O.H.W. has

chosen to invest his energy in opposing treatment, rather than engaging in treatment, which is why he hasn't successfully completed the program despite being at the hospital for sufficient time. (Tr. p. 39). As a result, Dr. Fox concluded that O.H.W. would have serious difficulty controlling his behavior if released. (Tr. p. 22).

[¶ 25] O.H.W. contends that the district court relied on historical information that should not be considered and there has not been recent behavior exemplifying serious difficulty controlling behavior. However, Dr. Fox testified that everything is historical in nature because there is no future data. (Tr. p. 42). Dr. Fox explained that he looks at behavior as recently as the day before he scored the tests and his behavior over the last few months with respect to treatment and impulsivity, and aggressiveness. (Tr. p. 42). In fact, Dr. Fox denied that all his data points for the Static-99, SRA-FV, and Psychopathy Checklist were 25 years or older as suggested by O.H.W. during the discharge hearing. (Tr. p. 43). Dr. Fox relied on recent behaviors exhibited by O.H.W. to assess that he would have serious difficulty controlling his behavior if released. (See Tr. generally).

[¶ 26] O.H.W. 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 O.H.W. remains a sexually dangerous individual.

[¶ 27] CONCLUSION

[¶ 28] Based upon the foregoing, the State respectfully requests that the order denying discharge filed on April 18th, 2019 be affirmed.

[¶ 29] Respectfully submitted this 25th day of September, 2019.

/s/ Leah J. Viste
Leah J. Viste, NDID #05692
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Plaintiff-Appellee

Emily Jo Christensen
Law Clerk
Certified under R. Ltd.
Practice of Law by Law Student

[¶ 30] CERTIFICATE OF SERVICE

[¶ 31] A true and correct copy of the foregoing document was sent by e-mail on the 25th day of September, 2019, to Tyler J. Morrow at tyler@kpmwlaw.com.

/s/ Leah J. Viste
Leah J. Viste, NDID #05692

[¶32] **CERTIFICATE OF COMPLIANCE**

[¶33] This brief complies with the page limit set forth in North Dakota Rules of Appellate Procedure 32(a)(8)(A) and is 14 pages in length.

/s/ Leah J. Viste
Leah J. Viste, NDID #05692