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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20190155
Sheridan County No. 42-08-R-00002

In the Interest of Raymond J. Voisine

The State of North Dakota, Petitioner and Appellee

v.

Raymond J. Voisine. Respondent/Appellant,

BRIEF OF APPELLEE
ORAL ARGUMENT REQUESTED

Appeal from an Order Denying Discharge
Entered May 10, 2019
Sheridan County District Court
South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

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Oral argument is requested to answer any questions regarding convoluted procedural issues.

¶ 1 **STATEMENT OF THE CASE**

¶ 2 The is an appeal from a May 10, 2019 order denying Raymond Voisine's discharge from the state's Sexually Dangerous Individual (SDI) program.

¶ 3 **STATEMENT OF FACTS**

¶ 4 Raymond Voisine has been before the Court on many occasions. He is an "atypical incest offender," (App. p. 22, ¶20) having had his grandson sexually gratify him by stroking his penis; keeping sexually exploitative pictures of one of his daughters who he also impregnated; having impregnated another daughter twice who then bore his children. Voisine used violence and threats of violence so his wife and children would submit to his sexual desires. In the Matter of Raymond J. Voisine , 2010 ND 17, 777 N.W.2d 908 [¶2-4] *(Reversed and Remanded for additional factual findings)*

¶ 5 Since then, Voisine has routinely petitioned for discharge from the SDI program. Interest of Voisine, 2012 ND 250, 823 N.W.2d 786; Interest of Voisine, 2014 ND 178, 859 N.W.2d 930; Interest of Voisine, 2016 ND 254, 888 N.W.2d 781; Interest of Voisine, 2018 ND 181, 915 N.W.2d 647. This time, Voisine's annual review hearing was initially scheduled for February 1, 2019. On January 30, 2019 the State motioned to continue that hearing because the North Dakota State Hospital had yet to provide the parties its annual review report. (App. p. 13) In addition, Voisine's evaluator had just submitted her 48-page annual review report on January 29, 2019. (App. p. 14) The trial court granted the state's request to continue the hearing. (App. p. 14-16)

¶ 6 On March 25, 2019, the court held Voisine's annual review hearing for this year. Dr. Peter Byrne testified as state's evaluator, Dr. Stacey Benson testified on behalf of Voisine. On May 10, 2019, the trial court issued findings of fact and ordered that Voisine remained a sexually dangerous individual. (App. p. 17-24)

¶ 7 **ISSUES**

¶ 8 **1. Was the trial court within its discretion to grant the State's motion to continue the February 1, 2019 annual review hearing?**

¶ 9 Voisine's arguments that the trial court was in error in continuing the February 1, 2019 annual review hearing are confusing because he misreads a court opinion and the SDI statutes. First, Voisine relies on In the Interest of M.D., 1999 ND 160, 598 N.W.2d 799 to support his position that the timing of this year's annual review hearing violated the statutory timelines for such hearings. In the Interest of M.D. is an initial commitment case, which has nothing to do with the procedural requirements and timelines for annual review hearings. Second, in his brief at [¶22], Voisine states that he requested an annual review in October 2018. The statute states:

> 25-03.3-18. Petition for discharge - Notice.
>
> 1. Annually, the executive director shall provide the committed individual with written notice that the individual has a right to petition the court for discharge. The notice must explain to the committed person when the committed person has a right to a hearing on the petition. The notice must inform the committed person of the rights this chapter affords the committed person at a discharge hearing. The executive director shall forward a copy of the notice to the committing court. If the committed individual is an individual with an intellectual disability, the executive director shall also provide the written notice to the individual's attorney, guardian, and guardian ad litem, if any.
> 2. If the committed individual files a petition for discharge and has not had a hearing pursuant to section 25-03.3-17 or this section during the preceding twelve months, the committed individual has a right to a hearing on the petition …

¶ 10 Therefore, if a SDI committed person requests an annual review hearing in October, given the time it takes for experts to do their examination, evaluations, and write their reports, it is not unreasonable to have to schedule that hearing for March. The trial court granted the continuance by written opinion and was well within its discretion to do so. (App. p.14-16)

¶ 11 **2. Whether the trial court properly denied Voisine's motion for a judgment as a matter of law?**

¶ 12 After Dr. Byrne's direct testimony at the Mach 25, 2019 hearing, but before cross-examination, his counsel told the trial court:

> MR. MORROW: Interesting, Your Honor. At this point I'm going to move pursuant to Rule 50 of the North Dakota Rules of Civil Procedure for a Judgment as a Matter of Law. Specifically, to that, the evaluation of Dr. Byrne was not admitted as evidence into this matter. If it would have been I would have objected to it. So we have no evaluation by Dr. Byrne. So right now we're working strictly the testimony of Dr. Byrne in regards to this.
>
> There's three prongs under the statute, Your Honor. There's also a volitional control element prong. Testimony was taken as to Prong 1, that's the prior offenses. At this time whether we dispute it or not is irrelevant. They are before the Court.
>
> Prong 2, there was a diagnosis presented. And Prong it appears – the testimony as to Prong 3 is although the scores say he's low risk, he's higher risk because he doesn't admit to the offenses but the literature says that doesn't create risk. I'm not sure. We'll get into that if we have to.
>
> What happened here though, Your Honor, is we have nothing as to the volitional control element. In fact, the direct testimony was in regards to Antisocial Personality Disorder, he has less symptoms than he used to have. So that is a change.
>
> What evidence was presented by the State as the volitional control element? That is required. That is a due process requirement. It is not part of the statute. It is required for the State to provide clear and convincing evidence that he has a problem controlling his behavior. That is present tense. What was provided by the State that shows, in the testimony, a volitional control element and that he can't control his behavior? There is nothing. There is no evidence before the Court in regards to what some refer to as Prong 4, the Crane standard, the volitional control element.
>
> The evaluation is not part of the record. If the argument is that it was filed at some point in time, e-filing is not record creation. It has not been offered as inclusion into the record of this case because if it had been, I would have objected to it as such.
>
> So right now all we have is the testimony of Dr. Byrne and we have nothing that went to the volitional control element, Your Honor. I would move for a directed --- excuse me, I think I'm using the wrong term there, as a Judgment as a Matter of Law, Rule 50 of the North Dakota Rules of Civil

> Procedure, Your honor. (Tr. p. 24, lines 10-25; p. 25, lines 1-25; p. 26, lines 1-6)

¶ 13 Voisine's oral motion for a judgment as a matter of law to the trial court related to the State not offering Dr. Byrne's evaluation as evidence at the hearing - even though it was already in the record because it is was required by the statute to be filed with the trial court before the hearing. *See* N.D.C.C. §25-03.3-17(2)(4).

¶ 14 In response to Voisine's argument, the State said:

> MR. ERICKSON: I resist, Your Honor. I do believe the evaluations were filed with the Court. We traditionally rely on those in advance so the Court has a chance to read the evaluations prior to the hearings. So I believe it is in the record. The testimony supplements that and allows it to be cross-examined, but there is ample evidence in the record at this point to meet the criteria, Your Honor. (Tr. p. 26, lines 8-15)

¶ 15 The trial court proceeded with the hearing, but at the end, stated to the parties that they have ten days to provide legal support regarding whether Dr. Byrne's evaluation was in the record or not. (Tr. p. 123, lines 15-22) In denying Voisine's motion, the trial court cited In re E.W.F., 2008 ND 130, 751 N.W. 2d 686, which held the evaluator reports in SDI cases is already in the record and the State has no duty to readmit that same report into evidence at the hearing. Id. At ¶10, ¶13; (App. p. 19-20) To hold otherwise would be to mandate a meaningless act.

¶ 16 **3. Whether the trial court properly denied Voisine's motion in limine?**

¶ 17 The day before the March 25, 2019, annual review hearing Voisine filed a motion in limine requesting the trial court revisit Judge Hill's previous ruling moving the annual review hearing from February 1st to March 25th. In his brief to this Court, Voisine does not cite to or mention this motion, nor does he provide it to the Court in his appendix.

¶ 18 Regarding the timing of the filing of Dr. Byrne's report, the trial court wrote:

> This Court finds that the State complied with the language of N.D.C.C. §25-03.3-17(2) and was not required to offer Dr. Byrne's report at the hearing, nor was the State required within 365 days of the previous report. This Court therefore considers Dr. Byrne's report in determining whether the State has met its burden. (App. p. 20, ¶11)

¶ 19 One point Voisine nor the trial court addressed is the months and months each year the district court has no jurisdiction to receive reports or do anything else in this matter because Voisine's case is under appellate review – and it has been that way since his initial commitment: An annual review of Voisine occurs; the hearing is held; the State meets its burden; and then Voisine appeals suspending district court jurisdiction for months. Once this Court affirms the trial court for a given year's review the process starts over anew within weeks or months. The constant appellate review of this matter makes Voisine's arguments about report filing timelines specious. The trial court exercised realism when it ruled that fixing "365" from report to report filing is not a correct reading of the statute – in fact, it's not possible with all the appeals in this case. (App. p. 14)

¶ 20 **4. Whether the trial court was correct in ruling the state has met its burden in finding Voisine still meets the SDI commitment criteria?**

¶ 21 In affirming the trial court's findings and order the last time Voisine was before the Court, Justice McEvers concurred specially by saying:

> [¶21] Although the district court's findings are thin as to whether the State met the burden to show Voisine would have serious difficulty controlling his behavior, the record supports the district court's ultimate finding. The court noted Voisine's lack of progress in treatment was a factor in finding Voisine would have serious difficulty controlling his behavior. We have said, "[l]ack of progress in treatment alone is insufficient to meet this requirement for commitment." In re Johnson, 2016 ND 29, ¶ 7, 876 N.W.2d 25 (emphasis in original). However, review of the record reflects more than just lack of progress; it showed a lack of participation in treatment, falling asleep in group, and times when Voisine did not attend treatment. Failure to attend and participate in treatment might demonstrate an inability to control behavior similar to the violation of other institutional rules. Id. at ¶ 10

> (citation omitted). While I am concerned the district court was relying on write-ups that occurred more than a year before the hearing was held, Voisine's conduct in treatment also supports the district court's finding that he would have serious difficulty controlling his behavior. Interest of Voisine 2018 ND 18 at [¶21]

¶ 22 Since then nothing has changed with Voisine's case other than he is a year older. The trial court dissected both experts' reports and testimony and issued detailed findings that Voisine still meets all four prongs that make up the SDI criteria. (App. p. 17-24)

¶ 23 "This Court reviews civil commitments of sexually dangerous individuals under a "modified clearly erroneous" standard of review. Interest of Tanner, 2017 ND 153, ¶ 4, 897 N.W.2d 901. We will affirm a district court's order denying a petition for discharge unless it is induced by an erroneous view of the law or we are firmly convinced it is not supported by clear and convincing evidence. Id.; Matter of Wolff, 2011 ND 76, ¶ 5, 796 N.W.2d 644. We accord "great deference to the [district] court's credibility determinations of expert witnesses and the weight to be given their testimony. Tanner, at ¶ 4; Wolff, at ¶ 5", Interest of Voisine 2018 ND 18 at [¶5]

¶ 24 The trial court's findings and order are based on the law and clear and convincing evidence – Voisine has not changed one bit since the last time he was before the Court.

¶ 25 **CONCLUSION**

¶ 26 The State respectfully requests the Court affirm the trial court's order in this case.

¶ 27 Respectfully submitted this 26th day of September, 2019.

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Defendant/Appellant,	)

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2019, I served a true and correct copies of the **BRIEF OF APPELLEE** upon the following named party by email as follows:

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/s/Marcella Albers
Marcella Albers

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner/Appellee's Brief is in compliance with Rule 32(a)(8)(A) in that it has not exceeded the 12 page limit.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2019, I served a true and correct copies of the **BRIEF OF APPELLEE** and **CERTIFICATE OF COMPLIANCE** upon the following named party by email as follows:

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/s/Marcella Albers
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