

IN THE SUPREME COURT OF NORTH DAKOTA

In the Matter of Lawrence Didier)	Supreme Court File No.
-----)	#202000217
Frederick Fremgen, State's Attorney,)	
Petitioner/Appellee)	Stutsman County Court File No.
)	#47-2010-MH-113
v.)	
Lawrence Didier,)	APPELLANT'S BRIEF
Respondent/Appellant)	

Appeal from the Findings of Fact, Conclusions of Law, and Order Denying Discharge entered August 13, 2020, by the Honorable Cherie L. Clark of the Stutsman County District Court, Southeast Judicial District

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner’s written arguments on their merits.

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 August 13, 2020. Didier timely filed this appeal on August 17, 2020.

ISSUE PRESENTED FOR REVIEW

- I. [¶ 2] **Whether the District Court's Order's factual basis regarding Didier's behavior is sufficient to legally conclude Didier has serious difficulty controlling his behavior.**

STATEMENT OF THE CASE

[¶ 3] 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.

[¶ 4] 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 July 31, 2020. 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.C.C. § 25-03.3-01(8) and denied Didier’s discharge on August 13, 2020. Didier appealed that decision on August 17, 2020.

STATEMENT OF THE FACTS

[¶ 5] 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 July 31, 2020. The state called Dr. Deidre M. D’Orazio (“D’Orazio”) to testify that Didier remained a sexually dangerous individual subject to continued civil commitment.

[¶ 6] The Stustman 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 August 13, 2020. Didier filed his appeal on August 17, 2020. In its Order, the district found that calling a peer a “Freak,” slamming a door, throwing personal belongings, arguing with a peer, swearing, looking down a staff member’s shirt, and not progressing in treatment was factually sufficient to draw the legal conclusion that Didier has serious difficulty controlling his behavior (District Court Order ¶’s 22-26).

ARGUMENT

I. [¶ 7] The District Court’s Order’s factual basis regarding Didier’s behavior is insufficient to legally conclude Didier has serious difficulty controlling his behavior.

[¶ 8] 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 serious difficulty controlling his behavior.

[¶ 9] 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.

[¶ 10] Although *Wolff* recognized that the inability to control behavior need not be sexual in nature, the factual finding by the district court that calling a peer a “Freak,” slamming a door, throwing personal belongings, arguing with a peer, swearing, looking down a staff member’s shirt, and not progressing in treatment during a review period is a

far cry from the above factual findings and does not support a legal conclusion that the state provided clear and convincing evidence that Didier has serious difficulty controlling his behavior.

[¶ 11] This Court has previously analyzed similar factual findings. Specifically, in *T.A.G.*, this Court stated, “The status in treatment and one statement regarding ‘cream pie’ do not establish a serious difficulty controlling behavior sufficient to satisfy the *Crane* due process requirement. Therefore, the finding that T.A.G. is a sexually dangerous individual is clearly erroneous.” *Interest of T.A.G.*, 2019 ND 115, 926 N.W.2d 702. Similarly, Didiers’s status in treatment along with normative behaviors done by every person on a weekly basis does not establish serious difficulty controlling his behavior as required by *Crane*.

[¶ 12] In *R.A.S.*, this Court found “The isolated instances of refusing two doses of prescribed medication do not establish a serious difficulty controlling behavior.” *In the Matter of R.A.S.*, 2019 ND 169, 930 N.W.2d 162. Finally, in *J.M.*, this Court found that an alleged altercation with another resident, a horseplay incident where J.M. threw a rock at another resident, and both experts testifying that J.M. had aggression issues was not clear and convincing evidence of serious difficulty. *In the Matter of J.M.*, 2019 ND 125, 927 N.W.2d 422.

CONCLUSION

[¶ 13] 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 does not reflect clear and convincing evidence showing serious difficulty controlling behavior over the review period.

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[¶ 15] 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 December, 2020.

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COMPLIANCE)	OF
Lawrence Didier,)	
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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 10 pages.

Dated: December 3, 2020.

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