

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of O.H.W.)	
)	
State of North Dakota,)	
)	Supreme Court No. 20210006
Petitioner and Appellee,)	District Court No. 09-04-R-00904
)	
vs.)	
)	
O.H.W.,)	
)	
Respondent and Appellant.)	

APPELLEE’S BRIEF

Appeal from the Findings of Fact, Conclusions of Law, and Order Denying
Discharge issued January 6, 2021 by the Honorable Stephannie N. Stiel,
Cass County District Court, East Central Judicial District

ORAL ARGUMENT REQUESTED

Renata J. Olafson Selzer, NDID #06076
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 Petitioner-Appellee

[¶ 1] TABLE OF CONTENTS

	<u>Paragraph No.</u>
Table of Contents	¶ 1
Table of Authorities.....	¶ 2
Statement of Issue.....	¶ 3
Statement of Case	¶ 5
Statement of Facts	¶ 8
Standard of Review	¶ 18
Law and Argument.....	¶ 22
Conclusion.....	¶ 38
Certificate of Compliance.....	¶ 41
Certificate of Service	¶ 44

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

United States Supreme Court Cases

Kansas v. Crane, 534 U.S. 407 (2002) ¶ 20

North Dakota Cases

In re R.A.S., 2008 ND 185, 756 N.W.2d 771 ¶ 20

In re Whitetail, 2015 ND 206, 868 N.W.2d 833 ¶ 30

Interest of T.A.G., 2019 ND 115, 926 N.W.2d 702..... ¶ 21, 24, 27

Interest of Voisine, 2019 ND 302, 936 N.W.2d 544..... ¶ 14

Interest of Voisine, 2018 ND 181, 915 N.W.2d 647..... ¶ 30, 34

Matter of Didier, 2019 ND 263, 934 N.W.2d 417 ¶ 30, 34

Matter of J.M., 2019 ND 125, 927 N.W.2d 422 ¶ 24, 26

Matter of R.A.S., 2019 ND 169, 930 N.W.2d 162..... ¶ 19, 24, 25

North Dakota Statutes

N.D.C.C. § 25-03.3–01..... ¶ 10, 20

North Dakota Rules

N.D.R.Civ.P. 52(a) ¶ 21

[¶ 3] STATEMENT OF ISSUE

[¶ 4] Whether the district court's factual basis was sufficient to support its conclusion that O.H.W. has serious difficulty controlling his behavior.

[¶ 5] STATEMENT OF CASE

[¶ 6] O.H.W. appeals from a district court order denying his petition for discharge and continuing his commitment as a sexually dangerous individual. O.H.W. claims the factual basis in the order was insufficient to support the conclusion that O.H.W. has serious difficulty controlling his behavior.

[¶ 7] The State asserts that clear and convincing evidence supported the district court's conclusion. In its order, the district court noted O.H.W.'s history of disciplinary actions while in a structured setting, O.H.W.'s recent aggressive behaviors at the North Dakota State Hospital (NDSH), his solicitation of inappropriate pen pals, and his desire to establish a relationship with an underage girl. These factors, when considered together with O.H.W.'s mental disorders, lack of insight, and lack of progress in treatment, support the conclusion that O.H.W. has serious difficulty controlling his behavior.

[¶ 8] STATEMENT OF FACTS

[¶ 9] On September 14, 2004, the State filed a petition alleging that O.H.W. is a sexually dangerous individual under chapter 25-03.3, N.D.C.C. (Appendix “App.” at 3.) On April 11, 2005, the district court granted the petition and committed O.H.W. to the North Dakota Department of Human Services. (App. at 4.) The district court has denied O.H.W.’s subsequent requests for discharge. (App. at 6, 7, 12, 14.) O.H.W. filed his most recent request for discharge on February 11, 2020. (App. at 14.) The discharge hearing was held on September 25, 2020. (App. at 15.) Dr. Erik J. Fox conducted the annual evaluation of O.H.W. and testified at the hearing. (App. at 16.) In an order dated January 6, 2021, the district court denied O.H.W.’s request for discharge. (App. at 29.)

[¶ 10] The district court concluded that O.H.W. continues to meet the three statutory criteria for a sexually dangerous individual under N.D.C.C. § 25-03.3-01(8). (App. at 29.) The court found that O.H.W. has engaged in sexually predatory conduct, citing O.H.W.’s convictions for Criminal Sexual Conduct and Gross Sexual Imposition. (App. at 19.) O.H.W. has been accused of sexually assaulting at least nine victims and has been convicted of sexually assaulting four victims. (App. at 19.)

[¶ 11] O.H.W. has several diagnoses, including pedophilic disorder and antisocial personality disorder. (App. at 20.) The district court noted that O.H.W. will always have the diagnosis of pedophilic disorder, and there are no criteria for remission. (App. at 20.) The court found that O.H.W. “meets at least six of the

criteria for anti-social personality disorder in that he demonstrates a failure to conform to social norms with respect to lawful behaviors.” (App. at 20.) O.H.W. has an “extensive adult criminal history in the community,” “behavioral problems in custody,” and a “long history of irritability and aggressiveness.” (App. at 20.) O.H.W. has been “physically and sexually violent” and “shows a lack of remorse for his actions.” (App. at 20.)

[¶ 12] The district court found Dr. Fox’s report and testimony to be credible and agreed with Dr. Fox’s conclusion that O.H.W.’s ““mental disorders make him likely to engage in further acts of sexually predatory conduct that constitutes a danger to the physical or mental health or safety of others.”” (App. at 24.) O.H.W.’s mental disorders “contribute to his criminal sexual behavior and impair his ability to appreciate the consequences of his criminal sexual behavior, as well as limit his recognition of the harm he causes his victims.” (App. at 21.)

[¶ 13] The district court referenced Dr. Fox’s use of actuarial instruments to assess O.H.W.’s risk for recidivism. (App. at 21-23.) Dr. Fox reported that O.H.W. scored a five on the Static-99R, placing O.H.W. at an above-average risk to reoffend. (App. at 22.) O.H.W. received a dynamic score of 38 on the VRS-SO, placing him in the category of “Well Above Average Risk.” (App. at 23.) Dr. Fox also completed the Hare Psychopathy Checklist, Revised, 2nd Edition, which showed that O.H.W. has moderate psychopathy. (App. at 23.) Dr. Fox explained that O.H.W.’s diagnoses, actuarial risk assessment scores, dynamic risk factors, and lack of treatment led him to conclude that O.H.W. is likely to engage in further acts

of sexually predatory conduct that would present a danger to the health or safety of others. (App. at 24.)

[¶ 14] In addition to meeting the statutory criteria, the district court concluded that O.H.W. has serious difficulty controlling his behavior. (App. at 24.) Recognizing that “there must be a nexus between the disorder and the ability to control behavior,” the district court noted that the standard “is not whether an individual remains the same as previous reviews.” (App. at 24.) Rather, “the evidence must clearly show a serious difficulty in controlling sexually predatory behavior.” (App. at 24.) Citing this Court’s decision in Interest of Voisine, 2019 ND 302, ¶ 6, 936 N.W.2d 544, the district court observed that “past conduct has some relevance” when determining whether this criterion has been met. (App. at 24.) Non-sexual conduct such as “[p]rior write-ups, demonstrating an 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 his behavior.” (App. at 25.)

[¶ 15] Regarding past conduct, the district court acknowledged O.H.W.’s “long history of disciplinary actions while incarcerated” and continued behavioral challenges and write-ups at NDSH. (App. at 26.) The district court noted that although O.H.W.’s behavioral issues have been “more limited” over the most recent review period, “there are still recent incidences that are aggressive in nature and that further support [O.H.W.] has serious difficulty controlling his behavior.” (App. at 26.) The district court listed six non-sexual behavioral incidents that “provide

evidence that [O.H.W.]’s antisocial personality is still energized.” (App. at 26-27.) In addition, the district court observed that O.H.W. “has a history of and continues to seek out inappropriate pen pal relationships demonstrating continued sexual preoccupation.” (App. at 27.)

[¶ 16] An issue “of particular concern to the Court” was O.H.W.’s response to a hypothetical posed to him on July 29, 2020, in which O.H.W. “indicated there would be no issue with him inviting a 13-year-old girl into his home who had recently broken up with her boyfriend and wanted to establish a more mature friendship.” (App. at 27-28.) The district court found this incident, together with O.H.W.’s other recent behavioral issues, “to be clear and convincing evidence of proof of the nexus between [O.H.W.]’s pedophilic disorder and the dangerousness of his antisocial disorder, together encompassing proof of his serious difficulty in controlling his behavior.” (App. at 28.)

[¶ 17] The district court concluded that O.H.W.’s “recent history of soliciting inappropriate pen pals, violent outbursts, and desire to still form a relationship with an underage girl suffices to distinguish [O.H.W.] from a dangerous but typical recidivist as a dangerous sexual offender whose disorder subjects him to civil commitment.” (App. at 28.) Given O.H.W.’s serious inability to control his behavior in a secure setting and his lack of progress in treatment, the district court opined that O.H.W. “would continue to have such a difficulty in a less restrictive environment, such as the community, at this time.” (App. at 28.)

[¶ 18] **STANDARD OF REVIEW**

[¶ 19] This Court applies a modified clearly erroneous standard when reviewing civil commitments of sexually dangerous individuals. Matter of R.A.S., 2019 ND 169, ¶ 5, 930 N.W.2d 162. The district court’s decision will be affirmed “unless it is induced by an erroneous view of the law, or we are firmly convinced the decision is not supported by clear and convincing evidence.” Id.

[¶ 20] At a discharge hearing, the State bears the burden of proving by “clear and convincing evidence that the committed individual remains a sexually dangerous individual.” In re R.A.S., 2008 ND 185, ¶ 6, 756 N.W.2d 771. To meet its burden, the State must show the individual has:

[1] engaged in sexually predatory conduct and ... [2] has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that [3] makes that 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.

Id. (citing N.D.C.C. § 25-03.3-01(8)). In addition to the three statutory requirements, there is a substantive due process requirement. Id. The evidence must establish that the person has “serious difficulty controlling his behavior.” Id. (citing Kansas v. Crane, 534 U.S. 407, 413 (2002)).

[¶ 21] When issuing a decision following a civil commitment hearing, the district court’s order must satisfy N.D.R.Civ.P. 52(a), which requires the court to “find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” Id. at ¶ 8 (quoting N.D.R.Civ.P. 52(a)). The

findings of fact and conclusions of law may be stated orally on the record, or the court may file an opinion. Id. Conclusory, general findings do not satisfy the requirements of N.D.R.Civ.P. 52(a). The district court “must specifically state the facts upon which its ultimate conclusion is based on.” Id. The court “errs as a matter of law when its findings are insufficient or do not support the legal conclusions.” Interest of T.A.G., 2019 ND 115, ¶ 6, 926 N.W.2d 702.

[¶ 22] LAW AND ARGUMENT

[¶ 23] Focusing on the substantive due process requirement, O.H.W. claims the district court's factual basis was insufficient to support the conclusion that O.H.W. has serious difficulty controlling his behavior. O.H.W. contends that the district court relies on past behaviors, "and the present behaviors do not rise to the level of serious difficulty controlling behavior." (Appellant's Br. at ¶ 10.) O.H.W.'s argument fails to recognize that the district court did not merely cite previous conduct; the court based its conclusion on a variety of factors. If each of O.H.W.'s recent behaviors were considered in isolation, they may be insufficient to satisfy the due process requirement. However, when considered together with O.H.W.'s past conduct, mental disorders, and lack of progress in treatment, there is ample support for the district court's conclusion.

[¶ 24] O.H.W. incorrectly analogizes his case to three previous cases in which this Court has remanded or reversed the decisions of district courts on the "serious difficulty" requirement: Matter of R.A.S., 2019 ND 169, 930 N.W.2d 162; Matter of J.M., 2019 ND 125, 927 N.W.2d 422; and Interest of T.A.G., 2019 ND 115, 926 N.W.2d 702. In all three cases, the Court found the district courts' findings inadequate to substantiate the "serious difficulty" requirement.

[¶ 25] In Matter of R.A.S., the district court cited the respondent's failure to take two doses of medication as evidence of his inability to control his behavior. 2019 ND 169, ¶ 11, 930 N.W.2d 162. Reversing the district court's decision, this Court held that "isolated instances of refusing two doses of prescribed medication

do not establish a serious difficulty controlling behavior.” Id. at ¶ 11. Although the district court “may rely on non-sexual conduct,” the evidence must clearly demonstrate the individual’s “serious difficulty in controlling sexually predatory behavior.” Id.

[¶ 26] Similarly, in Matter of J.M., the Court reversed the district court’s denial of the respondent’s request for discharge, holding that the “limited rule infractions relied on in this case do not establish the necessary connection between J.M.’s disorder and his likelihood of sexually reoffending.” 2019 ND 125, ¶ 16, 927 N.W.2d 422. The rule violations consisted of an incident in which the respondent threw a rock at another NDSH resident and an altercation with a resident that led to the respondent being temporarily moved to the most secure hospital unit. Id. at ¶ 13. However, “the State failed to establish a nexus between J.M.’s limited rule violations and his likelihood of sexually reoffending.” Id. at ¶ 18. The record established that the respondent had not acted out sexually, had not had any rule violations that were sexual in nature, and had either completed sex offender treatment or made substantial progress during the review period. Id.

[¶ 27] In Interest of T.A.G., the district court’s opinion referred to the respondent’s “behavioral issues” while at NDSH, his lack of progress in treatment, and one specific behavioral write-up in which respondent made a comment that was interpreted as a sexual innuendo. 2019 ND 115, ¶ 6, 926 N.W.2d 702. However, the district court did not explain the nexus between the respondent’s behavioral write-up and his disorder. Id. at ¶ 8. The district court’s analysis “seemed focused

on prognostic factors rather than contemporary evidence or specific instances to support the conclusion,” and it did not show how the respondent was different from the “dangerous but typical recidivist.” *Id.* at ¶¶ 8-9. Therefore, the Court remanded the case and instructed the district court to make specific findings. *Id.* at ¶ 10.

[¶ 28] By contrast, the district court’s order in O.H.W.’s case contains a thorough analysis of the connection between O.H.W.’s mental disorders and his serious difficulty in controlling sexually predatory behavior. The court noted O.H.W.’s diagnoses of pedophilic disorder and antisocial personality disorder, “evidenced by his extensive adult criminal history in the community and his behavioral problems in custody.” (App. at 20.)

[¶ 29] The court explained that O.H.W.’s disorders “contribute to his criminal sexual behavior and impair his ability to appreciate the consequences of his criminal sexual behavior, as well as limit his recognition of the harm he causes his victims.” (App. at 21.) Citing Dr. Fox’s findings, the court noted that O.H.W. is “volitionally impaired as a result of” his pedophilic disorder and antisocial personality disorder. The disorders “impact [O.H.W.]’s ability to control his own behavior by contributing to his impulsiveness and failure to plan ahead, and in many ways are contributing to his own reckless disregard for himself.” (App. at 21.)

[¶ 30] This Court has affirmed district courts’ findings of “serious difficulty controlling behavior” when courts have based their conclusions on multiple factors, rather than isolated incidents or general issues. *See e.g. Matter of Didier*, 2019 ND 263, ¶ 9, 934 N.W.2d 417 (holding that the respondent’s past and present conduct,

taken together, supported the district court’s finding that the respondent has serious difficulty controlling his behavior); Interest of Voisine, 2018 ND 181, ¶ 18, 915 N.W.2d 647 (noting that the respondent had multiple behavioral write-ups during the previous review period and had not made progress in treatment); In re Whitetail, 2015 ND 206, ¶ 15, 868 N.W.2d 833 (noting that the respondent failed to complete treatment, admitted he was not ready to be released, lacked community support, reoffended while on probation in the past, lacked supervision, and had a diagnosis of both pedophilia and antisocial personality disorder).

[¶ 31] The district court’s analysis in O.H.W.’s case did not simply rely on past conduct or an isolated incident of minor misbehavior. The nexus between O.H.W.’s disorders and his future dangerousness is multifactorial. Certainly, O.H.W.’s behavioral history is one factor. The court observed that O.H.W. has a history of impulsivity, irritability, aggressiveness, and he has been “physically and sexually violent and verbally aggressive towards others.” (App. at 20.) The most obvious and overarching concern is the fact that O.H.W. has been convicted of sexually assaulting four victims. Some of O.H.W.’s victims have been children, and O.H.W. admitted in 2015 that he was aroused by children, and if he reoffended, the victim would most likely be a child. (App. at 19.)

[¶ 32] In addition to sexually offending, O.H.W. has a “long history of disciplinary actions while incarcerated.” (App. at 26.) The district court noted that O.H.W.’s “behavioral challenges continued at NDSH” with thirty-three behavioral

write-ups between 2015 and 2016 and further behavioral problems in 2018 and 2019. (App. at 26.)

[¶ 33] O.H.W.’s continued inability to regulate his conduct is another factor in the analysis. The court recognized that although O.H.W.’s behavioral issues have been “more limited” during the present review period, Dr. Fox documented “recent incidences that are aggressive in nature and further support [O.H.W.] has serious difficulty controlling his behavior.” (App. at 26.) The district court cited six specific behavioral incidents that occurred during the review period. (App. at 26.) These incidents did not involve sexual misconduct, but the incidents cumulatively demonstrate that O.H.W. continues to engage in aggressive and antisocial behavior. (App. at 26.) The district court noted Dr. Fox’s conclusion that O.H.W.’s recent behaviors “are concerning and provide evidence that [O.H.W.]’s antisocial personality is still energized.” (App. at 27.)

[¶ 34] O.H.W.’s lack of participation in sex offender treatment is also a factor. Like Interest of Voisine and Matter of Didier, review of the record in O.H.W.’s case “reflects ‘more than just lack of progress, it show[s] a lack of participation’” Matter of Didier, 2019 ND 263, ¶ 9, 934 N.W.2d 417 (quoting Interest of Voisine, 2018 ND 181, ¶ 21, 915 N.W.2d 647). The district court referenced Dr. Fox’s report that O.H.W. “continues to refuse to engage in treatment in a manner which could mitigate his risk for re-offense.” (App. at 27.) O.H.W. is “still at Level 2 and has not addressed the dynamic factors he can change.” (App. at 27.) O.H.W. has refused treatment in the past. He failed to participate in sex

offender treatment while on supervised probation in 1998, resulting in revocation of his probation and an additional eight-year prison sentence. (App. at 19.) Dr. Fox expressed concern that O.H.W.’s lack of progress in treatment has left him unable to identify high-risk situations and recognize his sexual offending cycle. (App. at 27.)

[¶ 35] Dr. Fox’s concern is borne out in O.H.W.’s continued attempts to engage in inappropriate pen pal relationships and failure to understand the problem with befriending underage girls. This lack of insight is another factor that the district court considered in its analysis. The court noted that O.H.W. received a communication from a pen pal in 2020 containing comments about looking up a 16-year-old girl. (App. at 27.) O.H.W. became defensive when confronted about this communication. (App. at 27.) Moreover, O.H.W. indicated in response to a hypothetical question that there would be no problem with him inviting a 13-year-old into his home who wanted to establish a more mature friendship. (App. at 27.) The district court found O.H.W.’s response particularly concerning. (App. at 28.)

[¶ 36] The district court summarized its conclusions regarding the nexus between O.H.W.’s disorders and his serious difficulty in controlling his behavior. The court opined that O.H.W.’s “recent history of soliciting inappropriate pen pals, violent outbursts, and desire to still form a friendship with an underage girl suffices to distinguish [O.H.W.] from a dangerous but typical recidivist as a dangerous sexual offender whose disorder subjects him to civil commitment.” (App. at 28.) The court found O.H.W.’s “diagnosis, recent actions and lack of progress in

treatment” to be evidence of his “serious inability to control his behavior” and that O.H.W. “would continue to have such a difficulty in a less restrictive environment, such as the community, at this time.” (App. at 28.)

[¶ 37] The district court’s order is thorough and detailed, describing O.H.W.’s mental disorders, the effect these disorders have on his behavior, and O.H.W.’s continued inability to regulate his conduct. Although the district court considered O.H.W.’s previous behavioral issues, the court included several other factors in its analysis. O.H.W.’s most recent behavioral incidents were non-sexual in nature. However, when taken together, the incidents demonstrate O.H.W.’s ongoing struggle with aggressive and antisocial behavior. O.H.W. has refused to engage in treatment. Even though O.H.W. has acknowledged his sexual interest in children, he still lacks insight into the kinds of relationships and situations that could lead him to reoffend.

[¶ 38] **CONCLUSION**

[¶ 39] Based on the forgoing reasons, the State asks this Court to affirm the district court's order. The State requests oral argument to assist the Court in evaluating this matter and to answer any questions the Court may have.

[¶ 40] Respectfully submitted this 7th day of May 2021.

Renata J. Olafson Selzer, NDID# 06076
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 Petitioner-Appellee

[¶ 41] CERTIFICATE OF COMPLIANCE

[¶ 42] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8).

The page count is nineteen pages.

[¶ 43] Dated this 7th day of May 2021.

Renata J. Olafson Selzer, #06076
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

[¶ 44] CERTIFICATE OF SERVICE

[¶ 45] A true and correct copy of the foregoing document was sent by e-mail on the 7th day of May 2021, to Tyler Morrow at service@kpmwlaw.com.

[¶ 46] Dated this 7th day of May 2021.

Renata J. Olafson Selzer, #06076
Assistant State's Attorney