

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

In the Matter of Cruz Muscha,)	
)	Supreme Court File No. 20210071
Tonya Duffy, State’s Attorney,)	
Appellee,)	
v.)	Barnes Co. File No. 02-2012-MH-00035
)	
)	
Cruz Muscha,)	
)	
Respondent/Appellant.)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
DENYING DISCHARGE ISSUED FEBRUARY 8th, 2021

BARNES COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JAMES D. HOVEY, PRESIDING

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

[¶ 1] Whether the District Court’s factual basis was sufficient to support its conclusion that Cruz Muscha (“Muscha”) has serious difficulty controlling his behavior.

STATEMENT OF THE CASE

[¶ 2] Petitioner filed a petition for civil commitment as a sexually dangerous individual (“SDI”) on December 3, 2012. After a hearing Muscha was initially committed to the North Dakota State Hospital (“NDSH”) as an SDI on May 10, 2013. Muscha requested a discharge hearing under N.D.C.C. § 25-03.3-18. A hearing on that request was held on January 11, 2021. The Barnes County District Court determined that the State had established, by clear and convincing evidence, that Muscha remained a sexually dangerous individual pursuant to N.D.C.C. § 25-03.3-01(8) and denied Muscha’s discharge on February 8, 2021. Muscha appealed that decision on March 1, 2021.

STATEMENT OF THE FACTS

[¶ 3] On December 3, 2012, the State filed a petition alleging that Muscha is a sexually dangerous individual under chapter 25-03.3, N.D.C.C. (Appendix “App.” at 3.) On May 10, 2013, the district court granted the petition and committed Muscha to the North Dakota Department of Human Services. (App. at 4.) The district court has denied Muscha’s subsequent requests for discharge in 2015 and 2016, with waivers of the hearing being filed in 2018 and 2019. (App. at 5, 6) Muscha filed his most recent request for discharge on April 29, 2020. (App. at 6.) The discharge hearing was held on January 11, 2021. (App. at 7.) Dr. Deirdre D’Orazio (“Dr. D’Orazio”) conducted the annual evaluation of Muscha and testified at the hearing. (App. at 8.) In an order dated February 8, 2021, the district court denied Muscha’s request for discharge. (App. at 21.)

[¶ 4] STANDARD OF REVIEW

[¶ 5] 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.

[¶ 6] 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)).

[¶ 7] 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.

[¶ 8] **LAW AND ARGUMENT**

[¶ 9] The district court concluded that Muscha continues to meet the three statutory criteria for a sexually dangerous individual under N.D.C.C. § 25-03.3-01(8). (App. at 21.) The court found that Muscha has engaged in sexually predatory conduct, citing Muscha’s convictions for Sexual Assault and Gross Sexual Imposition. (App. at 10.) Muscha also conceded this element was satisfied. (App. at 10.)

[¶ 10] Muscha has several diagnoses, including Other Specified Pedophilic Disorder, Non-Consenting Males and Females (“OSPD”) and Antisocial Personality Disorder (“ASPD”). (App. at 10-11.) The district court noted that, in regard to the OSPD, Muscha “has acted on sexual urges involving non-consenting males and females for more than 19 years and against at least ten victims.” (App. at 11.) The court found that Muscha “meets at least six of the 7 ASPD symptoms...: (1) Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest. (2) Deceitfulness, as indicated by repeated lying, use to aliases, or conning others for personal profit or pleasure. (3) Impulsivity or failure to plan ahead. ... (5) Reckless disregard for safety of self or others. (6) Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations. (7) Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.” (App. at 11-12.) The Court found, and Muscha also conceded, the second statutory element is satisfied. (App. at 10, 12.)

[¶ 11] The district court found Dr. D’Orazio’s report and testimony to be credible and found that “Muscha is likely to engage in further acts of sexually predatory conduct – meaning his propensity toward sexual violence is of such a degree as to pose a threat to others” and as such, found that the third statutory element was satisfied. (App. at 17.) The district court noted that “There is a nexus between [Muscha’s] mental conditions, his past sexual offending, and his future propensity for sexual offending. The disorders ... cause serious difficulty controlling behavior. Doc. 131 at 31; Doc 157 at 28.” (App. at 19.) “Muscha has serious difficulty controlling his behavior in the institutional environment and

as evident during the current reporting period. This would be expected to worsen if discharged to a less restrictive alternative than the State Hospital at this time.” (App. at 20.)

[¶ 12] The district court referenced Dr. D’Orazio’s use of actuarial instruments to assess Muscha’s risk for recidivism. (App. at 21-23.) Dr. D’Orazio reported that Muscha scored a 9 on the Static-99R, placing Muscha at a “Well Above Average Risk Category” to reoffend, and described that score as “extremely high” noting that Muscha “scores higher than 99 out of 100 sexual offenders.” (App. at 13.) Dr. D’Orazio stated she has rated approximately 500 individuals using the Static-99R; of those, she stated she has “never had a 10” and has had “only a handful of 9” scores” ...again noting this score is “exceptionally high.” (App. at 13.) Dr. D’Orazio also administered the Structured Risk Assessment-Forensic Version (“SRA-FV”) on Muscha, who received a score of 3.92, which is considered to be “higher than the average sexual offender” and noted “This level of Need is consistent with the use of the Static99R High Risk High Needs Norms group.” (App. at 13-14.)

[¶ 13] Dr. D’Orazio also completed the Hare Psychopathy Checklist, Revised, 2nd Edition, which showed that Muscha has a “High level of psychopathy.” (App. at 15.) Dr. D’Orazio explained that Muscha’s “psychopathy is likely to influence his amenability to treatment, especially voluntarily adhering to conditions of release, and this has been clearly evident for Mr. Muscha in the past.” (App. at 15.)

[¶ 14] Related to his progress in treatment, the district court noted Muscha’s behaviors “since admission and since his last annual report indicate ongoing serious problems

managing his risk factors... not only is his pre-treatment long term risk very high, but the density of his outstanding treatment needs remains high.” (App. at 14.)

[¶ 15] In addition to meeting the statutory criteria, the district court concluded that Muscha has serious difficulty controlling his behavior. (App. at 20.) Recognizing that there must be a nexus between the disorder and the ability to control behavior, the district court noted that “despite Muscha’s high level in treatment, he lacks insight into his conditions and risk factors, refuses to participate in treatment (cognitive therapy), and does not demonstrate motivation for change. Mr. Muscha has previously completed sex offender treatment while incarcerated then went on to reoffend making the need for completing all aspects of therapy essential for him to successfully be released into the community... his risk assessment results predict he is at a very high risk for reoffending, and he continues to receive write ups for negative and inappropriate behavior while living in secure settings.” (App. at 21.)

[¶ 16] Focusing on the substantive due process requirement, Muscha claims the district court’s factual basis was insufficient to support the conclusion that Muscha has serious difficulty controlling his behavior. Muscha contends that the district court relies on past behaviors, “and the present behaviors do not support a legal conclusion ... of serious difficulty controlling behavior.” (Appellant’s Br. at ¶ 10.) Muscha’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 Muscha’s recent behaviors were considered in isolation, they may be insufficient to satisfy the due process requirement. However, when considered together with Muscha’s past conduct, mental disorders, and lack of progress in treatment, there is ample support for the district court’s conclusion.

[¶ 17] Muscha 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.

[¶ 18] 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.

[¶ 19] 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.

[¶ 20] 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.

[¶ 21] By contrast, the district court’s order in Muscha’s case contains a thorough analysis of the connection between Muscha’s mental disorders and his serious difficulty in controlling sexually predatory behavior. The court noted Muscha’s disorders cause serious difficulty controlling behavior. Muscha continues with this struggle even while in the institutional environment, and this would be expected to worsen if discharged to a less restricting alternative than the State Hospital at this time. (App. at 19-20.) Muscha’s current treatment provider also agreed Muscha should not be released at this time. (App. at 20.)

[¶ 22] 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).

[¶ 23] The district court's analysis in Muscha's case did not simply rely on past conduct or an isolated incident of minor misbehavior. The nexus between Muscha's disorders and his future dangerousness is multifactorial. Certainly, Muscha's behavioral history is one factor. The court observed that while Muscha has had some evidence of progress in his treatment and behavior, there is also evidence of concerns with Muscha's behavior and treatment. (App. at 17-18.) The district court found that an incident in October of 2020 involving Muscha pulling the hood of a peer's sweatshirt "tight to the point where the other peer reported it felt like he was being choked" and Muscha not stopping this behavior "until his peer raised his voice to a yell to stop" was a demonstration of serious difficulty controlling behavior that went beyond mere horseplay. (App. at 18.)

[¶ 24] Other treatment notes during this review period noted that Muscha "has been receiving phone calls from a former female staff member with whom he has groomed into a relationship, lied to mother about expectations he had for phone and staff[-]shopped into using staff phone, [was] not compliant with any of expectations, was caught spreading [a]

rumor that staff member got kicked off secure 3 for touching a client – this rumor is false and not CTC level behavior, was written up for inappropriate behavior on the job, was involved in an inappropriate behavior with a peer over the weekend, was restricted from day guesting at CTC house, [had] his unescorted walks placed on hold for one week, refused to attend Cog[nitive therapy], gets upset and argumentative when things don't go his way, and can be very manipulative.” (App. at 20.)

[¶ 25] The most obvious and overarching concern is the fact that Muscha has been “has acted on sexual urges involving non-consenting males and females for more than 19 years and against at least ten victims.” (App. at 11.)

[¶ 26] In addition to sexually offending, Muscha has a “numerous instances of acting out while incarcerated.” (App. at 15.) The district court noted these instances included... exposing his penis several inches from the faces of other inmates in his dorm, pretend[ing] to “butt fuck” [a victim], administrative sanction for sexual behavior involving other inmates, pleading guilty to a sexual assault (forcible sexual offense) while in the NDSH, engaging in sexually aggressive behaviors against a staff person, engaging in sexual infractions, exposing his penis, sexual horseplay, unwanted sexual touching, sexual activity with a staff person, sexual boundary violation against a staff person, holding a female staff persons keys, engaging in several sexual rule violations with a roommate, and the altercation involving pulling the sweatshirt of a peer until the peer felt like he was being choked. (App. at 15-16.)

[¶ 27] Muscha’s continued inability to regulate his conduct is another factor in the analysis. The court recognized that although Muscha’s has not “sexually acted out over the

review period,” the record contains multiple notations of Muscha exhibiting other negative behaviors during the review period, which demonstrate serious difficulty controlling his behavior.” (App. at 20.) The district court cited numerous specific behavioral incidents that occurred during the review period. (App. at 20.) These incidents did not involve sexual misconduct, but the incidents cumulatively demonstrate that Muscha continues to engage in aggressive and antisocial behavior. (App. at 20.)

[¶ 28] Muscha’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 Muscha’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. D’Orazio’s report that Muscha stated “I am no loner coming to Cog[native therapy].” (App. at 20.) Dr. D’Orazio expressed concern that although Muscha has the capacity to speak with accountability about his sexual behaviors, identify triggers and risk factors in his pattern of offending and apply this knowledge on a daily basis, he shows virtually no tendency or interest to do so. (App. at 19.)

[¶ 29] The district court’s order is thorough and detailed, describing Muscha’s mental disorders, the effect these disorders have on his behavior, and Muscha’s continued inability to regulate his conduct. Although the district court considered Muscha’s previous behavioral issues, the court included several other factors in its analysis. Muscha’s most recent behavioral incidents were non-sexual in nature. However, when taken together, the incidents demonstrate Muscha’s ongoing struggle with aggressive and antisocial behavior. Muscha has refused to engage in treatment. Even though Muscha has acknowledged his

sexual interest in children, he still lacks insight into the kinds of relationships and situations that could lead him to reoffend.

[¶ 30] **CONCLUSION**

[¶ 31] 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.

[¶ 32] Respectfully submitted this 17th day of June, 2021.

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)	COMPLIANCE
Respondent/Appellant.)	

Pursuant to North Dakota Rules of Appellant Procedure 32(e), I certify the Appellee's Brief is not in excess of thirty-eight (38) pages. The document consists of **fifteen (15)** pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of electronic service and the certificate of compliance.

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I hereby certify that on June 17th, 2021, I served an electronic copy of Appellee's Brief
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