

THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20220295
District Court No. 30-04-R-44

IN THE INTEREST OF G.L.D.

Allen Kopyy, State’s Attorney,)
)
 Petitioner/Appellee,)
)
 v.)
)
 G.L.D.,)
)
 Respondent/Appellant.)

BRIEF OF THE PETITIONER/APPELLEE
ORAL ARGUMENT REQUESTED

APPEAL FROM THE MEMORANDUM DECISION AND
ORDER OF COMMITMENT ENTERED OCTOBER 3, 2022 IN
MORTON COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT, NORTH DAKOTA
THE HONORABLE BOBBI WEILER, PRESIDING

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TABLE OF CONTENTS

Cover PagePg. 1

Table of Authorities..... Pg. 3

Statement of the Issues..... ¶1, ¶2

Statement of the Case..... ¶3

Statement of the Facts ¶4-¶10

Argument ¶12-¶25

 I. Standard of Review..... ¶11

 II. The Trial Court Did Not Err in Finding that the Respondent
Continues to be a Sexually Dangerous Individual by
Clear and Convincing Evidence..... ¶11

 A. 1st Prong: Having Engaged in Sexually Predatory Conduct ¶15

 B. 2nd Prong: Congenital or Acquired Condition Manifesting a Sexual
Disorder ¶16

 C. 3rd Prong: Respondent’s Disorders Make Him Likely to Engage in
Further Acts of Sexually Predatory Conduct ¶18

 D. 4th Prong: Clear and Convincing Evidence was Presented Showing the
Respondent to Have Serious Difficulty Controlling His Behavior.... ¶20

Reason For Requesting Oral Argument..... ¶ 26

Conclusion ¶27

TABLE OF AUTHORITIES

Precedents:

Interest of G.L.D., 2011 ND 52, ¶5, 795 N.W.2d 346 ¶5, 11

In the Interest of G.L.D., 2019 ND 304, 936 N.W.2d 539 ¶8

In the Interest of G.L.D. 2020 ND 45, 939 N.W.2d 405 ¶9

State of North Dakota v. G.L.D., 2011 ND 52, at ¶ 4, 795 N.W.2d 346 ¶13

Interest of Voisine, 2018 ND 181, 915 N.W.2d 647 ¶11

Matter of Hehn, 2015 ND 218, ¶ 5, 868 N.W.2d 551 ¶12

Interest of Tanner, 2017 ND 153, ¶ 4, 897 N.W.2d 901 ¶12

Matter of Hehn, 2008 ND 36, ¶ 19, 745 N.W.2d 631 ¶12, 20

Kansas v. Crane, 534 U.S. 407, 412-14, 122 S.Ct. 867, 151 L.Ed.2d 856
(2002) ¶12,13,20

Matter of Midgett, 2010 ND 98, ¶ 7, 783 N.W.2d 27 ¶13

Matter of G.R.H., 2006 ND 56, ¶ 18, 711 N.W.2d 587 ¶ 13

Interest of K.B., 2011 ND 152, 801 N.W.2d 416 ¶14

Statutes:

N.D.C.C. §25-03.3-17 ¶ 7, ¶10

N.D.C.C. §25-03.3-01(8) ¶12

N.D.C.C. §25-03.3-18(4) ¶10, ¶12

N.D.C.C. §25-03.3 [sic] ¶24

STATEMENT OF THE ISSUES

[¶ 1] Whether the District Court erred in denying the Motion for Discharge at the Discharge Hearing.

[¶ 2] Whether the Lower Court's Findings and Order Denying Discharge, which is dated October 3, 2022, were supported by clear and convincing evidence.

STATEMENT OF THE CASE

¶ 3] The Respondent petitioned for a discharge hearing. The hearing on the petition for discharge was held on September 26, 2022. After a discharge hearing on the merits of the Respondent's Application, the District Court denied the Application For Discharge. The Application for a Discharge was denied by the District Court's Order, dated October 3, 2022.

STATEMENT OF FACTS

¶ 4] The Respondent is committed as a sexually dangerous individual. He petitioned for discharge. The hearing on the most recent Petition for Discharge was held on September 26, 2022, before the Honorable Bobbi Weiler, Morton County District Judge. The State's expert was Dr. Peter M. Byrne, Psy.D. Dr. Byrne testified at the discharge hearing and his written report was filed and admitted on July 29, 2022. See Register of Actions, Doc. #472. The Court received and reviewed the submitted Report of Exam. The Respondent did not have an independently court-appointed expert to support his motion for discharge. The Order Denying Discharge, dated October 3, 2022, is found at Docket Index #487.

¶ 5] Citing from the Court's prior opinion in the case of *In the Interest of G.L.D. 2011 N.D. 52*, some of the pertinent factual background regarding G.L.D.'s commitment as a sexually dangerous individual can be recounted as follows: "G.L.D. was incarcerated in 1996 after a conviction for gross sexual imposition. Id. As his release date approached, the State petitioned to commit him for treatment as a sexually dangerous individual under N.D.C.C. Ch. 25-03.3, and in June, 2007, he was committed to the custody of the executive director of the Department of Human Services for treatment. Id. In October, 2008, G.L.D. [first] petitioned for discharge from treatment. Id. Dr. Lynne Sullivan, a psychologist at the State Hospital, evaluated G.L.D. in October, 2008, and she concluded he remain in the custody of the Department. Id. The court appointed Dr. Joseph Plaud, an independent psychologist, to perform an independent evaluation of G.L.D. at G.L.D.'s request and because Dr. Plaud had not completed his independent evaluation, the court twice continued the hearing on G.L.D.'s petition for discharge from treatment. Id. After

the court denied a third request for a continuance, the Court granted G.L.D.'s motion to withdraw that petition for discharge. Dr. Plaud thereafter submitted a January 5, 2010, evaluation, in which he concluded G.L.D. was not a sexually dangerous individual. Id. G.L.D. then filed a petition for discharge from treatment. Id. Dr. Robert Lisota, a psychologist at the State Hospital, evaluated G.L.D. in February 2010, and concluded G.L.D. remains a sexually dangerous individual. Id. at ¶3] At evidentiary hearings on G.L.D.'s petition for discharge, the district court heard testimony from Dr. Lisota, Dr. Plaud, and Dr. Sullivan and admitted into evidence the reports by Dr. Lisota and Dr. Plaud. Id. The court thereafter denied G.L.D.'s petition for discharge from treatment, finding by clear and convincing evidence he continues to be a sexually dangerous individual. Id. The court found that G.L.D. "continues to have a congenital or acquired condition manifested by a sexual disorder, a personality disorder or other mental disorder making it likely he will engage in further acts of sexually predatory conduct" and specifically identified his disorders as "paraphilia and anti-social personality disorder." Id. The court also relied on "the high scores on the actuarial risk assessment instruments and the finding of a high degree of [p]sychopathy" to find G.L.D.'s "condition makes [him] 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." Id. The court further found G.L.D. has serious difficulty in controlling his behavior as evidenced by his "two convictions for sexual offenses and two dismissals or acquittals of sexual offenses between these two convictions and his prison time; he continues to have difficulty following rules and has not completed any sex offender treatment that could reduce his risk to re-offend." Id. 2011 ND at 52."

[¶ 6] On April 29, 2016, the Respondent made an Application Requesting a Discharge Hearing. Docket Index #344. After several continuances of the discharge hearing and other action, the hearing on the Respondent’s Application for a Discharge Hearing was heard on its merits on June 3, 2019. Docket Index #409, #410.

[¶ 7] At the close of that hearing the District Court made its findings on the record, and in so doing, by denying the Respondent’s petition for discharge, the District Court “ordered, pursuant to Section 25-03.3-17 N.D.C.C. that the Respondent remain in the care, custody, and control of the Director of the North Dakota Department of Human Services until such time that in the opinion of the executive director, the Respondent is safe to be at large, and/or until further order of this Court.” Docket Index #413. That Order [Denying Discharge] is dated June 6, 2019. Docket Index #413.

[¶ 8] Upon the denial of the Respondent’s Application for a Discharge and Hearing, the Respondent timely filed a Notice of Appeal with the North Dakota Supreme Court, on June 11, 2019. Docket Index #414. That appeal followed from the District Court’s denial of Respondent’s motion for discharge and Order for continued commitment as a sexually dangerous individual. The Supreme Court issued its opinion, In the Interest of G.L.D. on December 18, 2019, remanding to the lower court to make further findings on whether G.L.D. may be likely to engage in sexually predatory conduct and whether G.L.D. may present difficulty in controlling his behavior. That opinion, In the Interest of G.L.D. is found at 219 ND 304. Supreme Court Case No. 20190179. Docket Index #419.

[¶ 9] On remand of the case to the lower court, the lower court made further findings, on January 8, 2022, that G.L.D. was likely to engage in sexually predatory conduct and may present difficulty in controlling his behavior. Docket Index #420. G.L.D. appealed the

lower court's findings on remand to the North Dakota Supreme Court on January 9, 2020. Docket Index #421. On April 1, 2020, the North Dakota Supreme Court summarily affirmed the additional findings of the lower court in its opinion in Docket Index #429, #430. That opinion is found at In the Interest of G.L.D. 2020 ND 45. Docket Index #425. G.L.D continues to be committed to the North Dakota State Hospital as an SDI.

[¶10] In the latest round of annual reviews, Mr. G.L.D. requested an annual review of his Commitment Order as an SDI by the filing a request for an annual review of his commitment and a request for a hearing on the request for a discharge from commitment, pursuant to Sections 25-03.3-17 and Section 25-03.3-18 N.D.C.C. Docket Index #432, #437. After several continuances, the discharge hearing was held on September 26, 2022, the Hon. Bobbi Weiler, presiding. At the hearing, the expert examiner Dr. Peter Byrne, testified on behalf of the petitioner, the State of North Dakota. Tr. pp. 4-59. At the conclusion of the hearing the Court took the matter under advisement. Tr. pp. 87-88. On October 3, 2022, the Court issued its Order Denying Discharge. Docket Index #487. It is from that Order, that the instant appeal follows, with the Notice of Appeal filed by the Respondent on October 6, 2022. Docket Index #488.

ARGUMENT

I. Standard of Review

[¶ 11] The Standard of review on appeal is a modified clearly erroneous standard, as stated in numerous previous precedents, including, *Interest of Voisine.*, 2018 ND 181, and going back to *Interest of G.L.D.*, 2011 ND 52, ¶ 5, 795 N.W.2d 346. A modified clearly erroneous standard of review means there will only be a reversal if there is an erroneous view of the law, or there is a lack of clear and convincing evidence.

II. The Trial Court Did Not Err in Finding the Respondent Continues to be a Sexually Dangerous Individual Supported by Clear and Convincing Evidence.

[¶ 12] The general rule regarding the State's burden of proof at a discharge hearing under the auspices of Section 25-03.3-01(8) of the North Dakota Century Code, presents a four-prong test as noted below. "[¶ 6] At a discharge hearing, the State must prove by clear and convincing evidence that the committed individual remains a "sexually dangerous individual" under Section 25-03.3-18(4) N.D.C.C. *Matter of Hehn*, 2015 ND 218, ¶ 5, 868 N.W.2d 551. Under Section 25-03.3-01(8) N.D.C.C., the State must prove three 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 disorder makes the individual likely to engage in further acts of sexually predatory conduct. *Interest of Tanner*, 2017 ND 153, ¶ 4, 897 N.W.2d 901. Furthermore, "the United States Supreme Court [has] held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior." *Matter*

of Hehn, 2008 ND 36, ¶19, 745 N.W.2d 631 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002)).

[¶13] In the instant case, the District Court appropriately applied the burden of proof upon the State as the Petitioner by statute and precedent. Specifically, it is provided that:

At a discharge hearing, the State has the burden of proving by clear and convincing evidence that the committed individual remains a sexually dangerous individual.” Matter of Midgett, 2010 ND 98, ¶ 7, 783 N.W.2d 27. Section 25–03.3–01(8), N.D.C.C., defines a “sexually dangerous individual” as:

[A]n individual who is shown to have [1] engaged in sexually predatory conduct and who [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.

We have construed that statutory definition of a sexually dangerous individual in conjunction with Kansas v. Crane, 534 U.S. 407, 412–14, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), and substantive due process to require the State to prove the committed individual has serious difficulty controlling his or her behavior. Matter of G.R.H., 2006 ND 56, ¶18, 711 N.W.2d 587. Under Crane and requirements for substantive due process, the definition of a sexually dangerous individual requires a connection between the disorder and dangerousness, including evidence showing the person has serious difficulty controlling his or her behavior, which distinguishes a sexually dangerous individual from the dangerous but typical recidivist in an ordinary criminal case. G.R.H., at ¶18.

Citing State of North Dakota v. G.L.D., 795 N.W.2d 346, 2011 ND 52, at ¶ 4.

[¶14] Regarding the State’s burden of proof by clear and convincing evidence, the State proffers the Sexually Dangerous Individual case of *In the Interest of K.B.*, 2011 ND 152, 801 N.W.2d 416. By this definition, the State must show evidence which leads to a firm belief or conviction that the allegations are true. In the instant case there is evidence that leads to more than a mere firm belief or conviction that the allegations are true, and the elements of proof have been proved. *Id.*

A. 1st Prong: Having Engaged in Sexually Predatory Conduct

[¶15] With regard to the first prong of the State’s three elements of proof at a discharge hearing, that G.L.D. is alleged to have previously engaged in sexually predatory conduct, the Trial Court relied on G.L.D.’s prior convictions for sexual offenses. The Gross Sexual Imposition conviction from Morton County occurred prior to the original commitment. Then there was an additional prior conviction arising from the State of Washington, dating back to 1983, when G.L.D. was about 21 years old. Additionally, at the discharge hearing, the Respondent stipulated to clear and convincing evidence on Prong 1 of the elements, above, with the following colloquy with the Court:

MR. MORROW: And Your Honor, while they’re doing that, I did receive the CV no objection to that being entered. I have worked with Dr. Byrne previously, I would stipulate to his expertise under 25-03.3, and I believe his review—or excuse me, reevaluation dated July 28, 2022, was already in the record. I don’t have an index number in front of me. That comes in either way so I would just—I don’t know if the Court wants to take judicial notice or—but that would be in as evidence as well.

THE COURT: And that’s docket 472.

Anything from you Mr. Kopyy?

MR. KOPYY: No, Your Honor

MR. MORROW: And I guess one more, just to make things easier.

THE COURT: Yeah.

MR. MORROW: We would also stipulate to prong one. It is barred by res judicata from relitigating, but we'd stipulate to it to make life easier as well.

Tr. p. 3, ll. 21-25; p. 4. ll. 1-13.

B. 2nd Prong: Congenital or Acquired Condition Manifesting a Sexual Disorder

[¶16] Dr. Peter M. Byrne, Psy.D., was the court-appointed expert evaluator in the matter of the Respondent's petition for a hearing on the Application for a Discharge. At the Discharge Hearing on September 26, 2022, Dr. Byrne testified at length on the previously diagnosed disorders that the Respondent has, including: 1) Specified Paraphilic Disorder [OPSD] [Tr. p. 12, ll. 4-25]; 2) Antisocial Personality Disorder [Tr. p. 15, ll. 20-24]; and 3) Alcohol Use Disorder in controlled environment remission. [Tr. pp. 15, ll. 25]

[¶17] Regarding the Specified Paraphilic Disorder [OPSD], Dr. Byrne explained that "paraphilia is essentially our [sic] intense or persistent sexual interest in things other than sexual interest in general stimulation, or preparatory fondling, that the DSM calls it, with a normal, physically mature, consenting human partner. [Tr. pg. 13, ll. 1-5] Next is Respondent's Antisocial Personality Disorder, which Dr. Byrne found when "essentially, when one reviews Respondent's history prior to even commitment, there's a long history of this and it's a pervasive pattern of disregard for an violation of the rights of others since the age of 15. That's one of the-- that's straight from the manual itself. [Tr. p. 16, ll. 17-23] And finally there is the Alcohol Use Disorder in sustained remission while the Respondent is in a controlled environment. [Tr. pp. 22-23].

**C. 3rd Prong: Respondent's Disorders Make Him Likely To Engage In
Further Acts Of Sexually Predatory Conduct**

¶18] Regarding the Respondent's likelihood to engage in further acts of sexually predatory conduct, Dr. Byrne testified at the discharge hearing that:

And then when the Static--99 and STABLE [2007] were combined together for an overall sexual risk estimate, he remained in the well-above average range and in a place of being, based on his scores with the combination of the two measures, was three to four more times likely to reoffend than the average sex offender. So in that – on the basis of his diagnostics, the way that intersects with his history, as well as his future sexual risk, and then also with sexual risk from the empirical actuarial measures, I found that he had met the criteria of being likely to engage in future acts of sexually predatory conduct.

[Tr. p. 26, ll. 2-13]. [parenthetical added]

¶19] Regarding the third prong of proof bearing on the likelihood of reoffending if released from his SDI commitment at the North Dakota State Hospital, Dr. Byrne went on to testify:

So essentially my conclusion would be that since he's already engaged in prior sexually--prior acts of sexually predatory conduct and he meets diagnostic criteria for other specific--or Other Paraphilic Sexual Disorder, and the specified one would be nonconsent, as well as Antisocial Personality Disorder and Alcohol Use Disorder, and that these conditions really caused him to commit his sexual offending behavior.

And that really the--one that's present in the review period, either of them could be--alone could create an initial reason to believe he may be likely to engage in further acts, but the one that I saw more evidence of in this review period is the Antisocial Personality Disorder. I didn't see the symptoms, and again with the caveat that he doesn't have the ability to be alone with any of the target individuals, typically adult females.

And then that would contribute to him being likely to engage in further acts of sexually predatory conduct. In looking at risk assessment, he fell into the well-above above average range as well, which again made him three to four more times likely. So on those bas[e]s I found him to be likely to engage in future acts of sexually predatory conduct.

[Tr. pp. 29-30.] [parenthetical added]

D. 4th Prong: Clear And Convincing Evidence Was Presented Showing The Respondent To Have Serious Difficulty Controlling His Behavior

[¶20] In addition to meeting or exceeding the three prongs of proof, above, to meet its burden at a discharge hearing, the State must also satisfy the substantive due process element set forth in the cases cited above and below. Citing from them, furthermore, "the United States Supreme Court [has] held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior." Matter of Hehn, 2008 ND 36, ¶ 19, 745 N.W.2d 631 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002)).

[¶21] Regarding the fourth prong, above, that the Respondent would have serious difficulty controlled his behavior as it relates to his personality disorders and sexually predatory conduct, Dr. Byrne testified as follows on that issue:

And then earlier I had mentioned that during the review period there's multiple instances of verbal aggression and threatening behavior, which are essentially various facets of the Antisocial Personality Disorder symptoms that were present, and this is all occurring in --in a secure environment, and I would believe that would get worse in a less secure environment.

And so I found that he has serious difficulty controlling his behavior at this particular point in time. And then, by definition, since he's met all of the prongs, I believe he is still a sexually dangerous individual as that is defined by the North Dakota Century Code.

[Tr. p. 32.]

[¶22] In making its finding that the State had met its burden of proof that the Respondent is likely to engage in further acts of sexually predatory conduct as defined in the North Dakota Century Code, the lower court went on to find: "In addition, the sex offender risk

assessment tools which have been used to evaluate [the Respondent] demonstrate that there is high risk.” [Order Denying Discharge p. 3, Docket Index #487]

[¶23] In holding that the Respondent would have serious difficulty in controlling his behavior if he was discharged from the State Hospital at this time, the lower court stated as follows:

[The Respondent] has refused to participate in treatment and to take responsibility for his actions. Although not having any sexual deviant behaviors during this report period, [the Respondent] continues to have write-ups for major and minor violations of the rules. [He] does not believe the rules apply to him and when gets write-ups he will take out his frustrations on the staff. He continues to blame others for his inappropriate conduct. When [He] testified, he went into detail about some of the “issues” he says he has to deal with at the State Hospital, including sexual harassment from other residents. It appeared to the Court he was trying to justify his inappropriate conduct instead of finding appropriate ways to handle the situation. He continues to not be able to control his impulses even with simple issues. He does not care about the consequences. Over the review period, he has repeatedly violated the personal space of people when angry, has been verbally aggressive, and threatened others with harm or death. *Id.* pgs. 6-14 and Appendix. His verbal aggression includes issues of power and control and includes derogatory labels for females such as “bitch” and “cunt”. His Antisocial Personality Disorder would make it difficult for him to control his behavior and conform to socially acceptable norms.

[Order Denying Discharge, p. 4, Docket Index #487.] [parentheticals added]

[¶24] As such, the lower court found, by clear and convincing evidence, that the Respondent continues to be a sexually dangerous individual under N.D.C.C. §25-03.3, and ORDERED, that the Respondent, shall continue to be committed to the care, custody, and control of the Executive Director of the Department of Human Services for such time until, in the opinion of the Executive Director, the Respondent is safe to be at large and has received the maximum benefits of treatment. [Order Denying Discharge, *Id.*, p. 4, Docket Index #487.]

[¶25] Therefore, the State argues the findings and order of the District Court should be in all respects affirmed.

REASON FOR REQUESTING ORAL ARGUMENT

[¶26] The Appellee is requesting oral argument pursuant to N.D.R.App.P.28(h) to explain the intricacies of not only the underlying facts but also the argument presented in this brief.

CONCLUSION

[¶27] For the reasons stated above, the State asserts the Respondent's claim of error that the State did not prove the Respondent continued to be a sexually dangerous individual is without merit. The State respectfully requests that the Judgment and Order of the District Court be, in all respects, affirmed on appeal.

Dated this 13th day of February, 2023.

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Petitioner/Appellee,)	
)	
v.)	CERTIFICATE OF COMPLIANCE
)	
G.L.D.,)	
)	
Respondent/Appellant.)	

¶ 1] This Appellee'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 17 pages.

Dated this 13th day of February, 2023.

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v.)	CERTIFICATE OF SERVICE
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G.L.D.,)	
)	
Respondent/Appellant.)	

¶ 1 The undersigned, being of legal age, being first duly sworn, deposes and says that he served a true and correct copy of the following document(s):

Brief of Petitioner/Appellee
Certificate of Compliance
Certificate of Service

On the Respondent/Appellant's counsel, by electronic mail through the electronic file and serve system to Tyler J. Morrow: tyler@morrowlawfirms.com.

Dated this 13th day of February, 2023.

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On the Respondent/Appellant’s counsel, by electronic mail through the electronic file and serve system to Tyler J. Morrow: tyler@morrowlawfirms.com.

Dated this 15th day of February, 2023.

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