This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0610

In the Matter of the Civil Commitment of: Richard Allen Smuda.

Filed November 1, 2021
Affirmed
Segal, Chief Judge

Becker County District Court
File No. 03-PR-19-2580

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Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Hooten, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

On appeal from his commitment as both a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), appellant argues that the record does not support the district court's determinations that he (a) engaged in a course of conduct sufficient to justify his commitment under the SDP and SPP statutes, (b) has a sexual, personality, or other mental disorder or dysfunction that prevents him from exercising adequate control

over his sexual impulses, (c) is highly likely to engage in future harmful sexual conduct, and (d) has an utter lack of control over his sexual impulses. We affirm.

FACTS

On May 12, 2020, respondent Becker County filed a petition to civilly commit appellant Richard Allen Smuda as an SDP and an SPP. Smuda was already under commitment as a person with mental illness at the time the SDP and SPP petition was filed. The fact summary below is taken from the testimony and evidence presented at Smuda's SDP and SPP commitment trial.

The first known sexual assault by Smuda occurred in North Dakota in August 1986, when Smuda sexually assaulted K.J., a 20-year-old female. On the day of that assault, Smuda invited K.J. to go on a drive with him. While on the drive, Smuda suggested that they "make love." When K.J. refused, Smuda drove to a secluded area down a back road. Smuda then pulled a knife on K.J., ordered her to remove her clothes, and forced her to perform oral sex on him. Smuda held the knife near K.J.'s face throughout the assault. Smuda then warned K.J. that, if she reported the incident to the police, he would "get her." Smuda was charged with sexual assault and was found guilty of the offense at a trial held in March 1987.[1] Smuda was sentenced to serve time in the North Dakota State Penitentiary.

After his release from prison, Smuda sexually assaulted T.Y., a 27-year-old female, in October 1990. T.Y. met Smuda in September 1989, and the two began a romantic

[1] Smuda also pleaded guilty to felony possession of a controlled substance and misdemeanor possession of drug paraphernalia.

relationship. In December 1989, Smuda physically assaulted T.Y. and gave her two black eyes. He regularly beat her once or twice a month after that. In the summer of 1990, T.Y. began meeting with a counselor from the Rape and Abuse Center. Smuda regularly beat her after she returned from counseling.

On the evening of October 5, Smuda and T.Y. got into an argument after T.Y. refused to let Smuda borrow her car. Smuda became upset, but a neighbor was able to calm him down. Smuda then told T.Y. he wanted to go for a drive. Smuda forced T.Y. into the car and drove her to a secluded location. He then struck her face, causing her nose to bleed, and ordered her to eat her own blood. Smuda next ordered T.Y. to put her hands in a plastic bag and eat the contents; T.Y. reached inside and discovered that the bag was full of fresh human feces. Smuda forced her to eat some of the feces and "to put some of the feces on his penis and to perform fellatio on him and lick the feces off his penis." Smuda beat T.Y. during the sexual assault and she suffered injuries to her face and chest, including bruises, a possible broken nose, and blurred vision in her right eye. The assault lasted approximately five hours, after which Smuda warned T.Y. not to report what had happened.

T.Y. moved out of the trailer she shared with Smuda after the assault, telling Smuda she was going to a pawn shop, but she never returned. Smuda discovered where she was living, went to the location, threatened to kill her, and brandished a knife. T.Y. obtained a no-contact order, which Smuda violated within two days of being served with the order. Approximately a week after Smuda was arrested, the jail staff where he was being held searched his cell and discovered a long, rambling letter that described in graphic detail the

sexual assault against T.Y. The letter blamed T.Y. for the assault, using sexually graphic and demeaning language. Smuda pleaded guilty to the sexual and physical assault. He was sentenced to eight years in prison. Smuda was placed on supervised release in July 1994, but his release was revoked on multiple occasions based on his failure to remain law-abiding. Smuda was ultimately discharged from prison in August 1998 after his sentence expired.

Smuda's lengthy history of mental illness predates his first criminal sexual assault. Smuda was first admitted to the North Dakota State Hospital (NDSH) for treatment of psychiatric symptoms in February 1985. Smuda was admitted at least 13 more times to NDSH over the years for a variety of reasons. Smuda has consistently exhibited delusional and paranoid behavior, repeatedly claimed to be Jesus Christ, and displayed disorganized and irrational thoughts such as claiming "he could create a human being from walnuts and apples." When experiencing his mental-health symptoms, he often became aggressive and violent, and assaulted girlfriends, his mother, and grandmother on several occasions. Early diagnoses attributed this behavior to his marijuana use, but he later received numerous mental-health diagnoses including schizophrenia, bipolar disorder, substance-use disorders, and antisocial personality disorder. He was prescribed Haldol and other medications to help treat his delusions and psychosis.

Smuda has either been in prison or subject to civil commitment almost continuously since his imprisonment for the sexual assault of K.J. in 1987. After his discharge from prison in August 1998 for the sexual assault of T.Y., he was convicted of felony theft and returned to prison in February 1999. He was civilly committed as mentally ill for various

periods between November 1999 and June 2001. In June 2001, he was again convicted of felony theft and was returned to prison, where he remained until 2004 due to another conviction for felony assault on a correctional officer. Then, from March 2004 until April 2011, Smuda was civilly committed to NDSH as a "sexually dangerous individual."[2] He returned to prison in April 2011 after being convicted of assaulting an employee at NDSH. His commitment as a sexually dangerous individual continued after his release from prison in December 2015. He remained civilly committed at NDSH as a sexually dangerous individual until July 2019, after the North Dakota Supreme Court reversed the district court's most recent recommitment order.[3] Smuda never completed sex-offender treatment during his commitment at NDSH.

While in prison and in civil commitment, Smuda repeatedly engaged in inappropriate sexual behavior directed at female staff members. Smuda habitually exposed himself and masturbated in the presence of female correctional staff. The first reported instance of this behavior occurred in April 1999, when a female correctional officer

[2] North Dakota's sex-offender civil-commitment statute uses the terminology "sexually dangerous individual." N.D. Cent. Code § 25-03.3-01.8 (2020).

[3] In May 2018, Smuda petitioned for discharge from his civil commitment at NDSH. Following a hearing, the district court denied the petition. In denying the petition, the district court cited Smuda's refusal to take his medication on two occasions as evidence of his inability to control his actions. Smuda appealed the denial of his petition for discharge, and in June 2019, the North Dakota Supreme Court concluded that Smuda's refusal to take his medication as prescribed on two occasions did "not establish a serious difficulty controlling behavior" and reversed the denial of Smuda's discharge petition for "lack of findings sufficient to conclude the due process requirement has been met." *In re R.A.S.*, 930 N.W.2d 162, 164, 166 (N.D. 2019). A new petition to extend his commitment was not filed and Smuda was released from NDSH.

reported that Smuda was masturbating while she was doing rounds, and that it was obvious to her that he intended her to see his behavior. The district court identified dozens of subsequent occasions over the course of the next decade and a half in which Smuda repeated this behavior and either exposed himself or masturbated in the presence of female staff. As a result of this behavior, Smuda was cited with and punished for sexual harassment and indecent exposure on multiple occasions.

Smuda also wrote sexually graphic and inappropriate letters to female staff. In October 1994, Smuda wrote two such letters to his former correctional therapist. And in April 2001, Smuda sent a long, extremely graphic letter to a counselor at the North Dakota State Penitentiary who had previously worked with Smuda. The counselor had not worked with Smuda for over two years when he sent the letter. The counselor reported the letter to the Fargo Police Department.

Smuda also has a long history of physically assaulting law-enforcement officers, correctional officers, and state hospital employees. Between 1990 and 2012, Smuda was convicted of at least four assaults against different officers and hospital staff members. For example, in 2011, Smuda was sentenced to five and one-half years in prison after he was convicted of physically assaulting an NDSH employee.

The relapse prevention plan developed by Smuda upon his discharge from NDSH provided that he would return to Minnesota to live with his mother in Detroit Lakes and would stay on his medications. Smuda did move to Detroit Lakes to live with his mother, but soon began to exhibit bizarre behavior. For example, he was observed wandering into several residential yards, was issued a trespass notice at a casino, and went into a local

bank, speaking irrationally and claiming that he was sticking up the bank. When law enforcement responded to a call from the bank, Smuda informed them that he had stopped taking his medication for bipolar disorder.

In early October 2019, less than three months after Smuda's discharge from NDSH, Smuda's mother called law enforcement and told them that Smuda was behaving irrationally and throwing food around because he believed it was poison. She reported that he had stopped taking his medication and requested that he be placed on a 72-hour psychiatric hold. Before law enforcement arrived at the residence, Smuda began stabbing the refrigerator with a knife and scissors. Smuda put down the knife and scissors when law enforcement arrived, but physically resisted going with the officers. Law enforcement transported Smuda to a hospital, where Smuda began rambling about a family member who he claimed visited him during the night and then vanished. Smuda also claimed that people were trying to contact him through fluorescent lights.

A doctor applied for an emergency psychiatric hold pending the filing of a petition to commit Smuda as a person with mental illness. Smuda was then transferred to a psychiatric unit at a hospital, where he continued to exhibit delusional behavior and indicated that he believed the world was ending. The district court civilly committed Smuda as a person with mental illness on October 11, 2019. The district court later authorized the involuntary administration of neuroleptic medication and, in March 2020, continued the civil commitment for an additional 12 months. The SDP and SPP petition was filed while Smuda was still under commitment as a person with mental illness.

After the SDP and SPP petition was filed in May 2020, the district court appointed Dr. James Alsdurf as the first court-appointed examiner and, at Smuda's request, appointed Dr. James Gilbertson as the second court-appointed examiner. The hearing on the SDP and SPP commitment petition was held in November 2020. Dr. Alsdurf, Dr. Gilbertson, Smuda, Smuda's mother, and Smuda's brother all testified at the hearing.

Dr. Alsdurf testified that Smuda met the criteria to be committed as both an SDP and SPP. Dr. Gilbertson was more guarded in his opinion and testified that it was "arguable" that Smuda met the criteria for commitment as an SDP and SPP. Neither expert opined that Smuda failed to meet the criteria for commitment under either the SDP or SPP statutes. Smuda presented no expert testimony or reports in opposition to the court-appointed examiners.

After the conclusion of the hearing, the district court issued an order civilly committing Smuda as both an SDP and SPP. In doing so, the district court found both examiners to be credible, but found that Dr. Alsdurf was generally more credible. The district court noted that Dr. Gilbertson had a previous relationship with Smuda from a prior proceeding, incorrectly identified the cut-off age for conduct disorder as a precursor for a diagnosis of Antisocial Personality Disorder, and did not conduct a separate analysis of individual risk factors when evaluating Smuda, whereas Dr. Alsdurf did not have a previous relationship with Smuda, correctly identified the cut-off age, conducted a separate analysis of individual risk factors, used multiple risk-assessment instruments in his evaluation, and more "clearly testified regarding Smuda's risk and diagnoses." Smuda now appeals.

DECISION

I. The record supports the district court's determination that Smuda meets the statutory criteria for commitment as an SDP.

Smuda argues that the record does not support the district court's determination that he meets the criteria for commitment as an SDP. A person is a sexually dangerous person if he:

> (1) has engaged in a course of harmful sexual conduct . . . ;
> (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and
> (3) as a result, is likely to engage in acts of harmful sexual conduct . . . .

Minn. Stat. § 253D.02, subd. 16(a) (2020). To satisfy the third requirement, there must be evidence that the person is not just "likely" to engage in future acts of harmful sexual conduct, but is "highly likely" to do so. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 20-22 (Minn. 2014).

We review a district court's factual findings on the elements of the civil-commitment statutes for clear error. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *rev. denied* (Minn. June 20, 2006). Appellate courts "will not conclude that a factfinder clearly erred unless, on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *In re Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotations omitted). As a result, an appellate court must "fully and fairly consider the evidence, but so far only as is necessary to determine [whether that evidence] reasonably tends to support the findings of the factfinder." *Id.* at 223 (quotation omitted).

When the findings of fact are based "almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law, which this court reviews de novo. *In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn. App. 2013), *rev. denied* (Minn. Mar. 27, 2013).

Smuda challenges the district court's determination relating to all three of the statutory requirements for commitment as an SDP. We address each of his arguments below.

A. Course of Harmful Sexual Conduct

The first statutory requirement for commitment as an SDP is that Smuda "has engaged in a course of harmful sexual conduct." Minn. Stat. § 253D.02, subd. 16(a)(1). "Harmful sexual conduct" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." *Id.*, subd. 8(a) (2020). A "course of conduct" is defined by its ordinary meaning, which is a "systemic or orderly succession; a sequence." *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2002). To determine whether an offender has engaged in a "course of harmful sexual conduct," a court should consider "both conduct for which the offender was convicted and conduct that did not result in a conviction." *Stone*, 711 N.W.2d at 837.

Smuda concedes that his convictions for sexually assaulting K.J. and T.Y. "clearly meet the presumption that the victims suffered physical or emotional harm" under Minn.

Stat. § 253D.02, subd. 8(b) (2020). But he argues that those two convictions were his only "hands-on sexual offenses" and that there are no subsequent "allegations of hands-on harmful sexual conduct" against him. He acknowledges that the "decades of treatment records and prison logs" contain reports of "potentially offensive sexual behavior," but argues that "[n]one of these observed behaviors involved any physical contact or physical harm." He maintains that the district court's finding that these behaviors were part of a course of harmful sexual conduct is thus clearly erroneous.

We disagree. As noted above, the court may take into consideration not only conduct that resulted in convictions, but also conduct that did not. *Id.* And there is no requirement that the conduct must be "hands-on." The definition of "[h]armful sexual conduct" includes not only harmful conduct that creates a substantial risk of physical harm, but also that which "creates a substantial likelihood of serious . . . emotional harm." Minn. Stat. § 253D.02, subd. 8(a). And, as this court has stated, "The standard is not that it *must* create physical or emotional harm; rather, there must be a substantial likelihood of harm." *Ramey*, 648 N.W.2d at 269. Here, the record supports the district court's finding that Smuda's conduct in repeatedly exposing himself and masturbating in front of, and writing extremely graphic letters to, female staff created a substantial likelihood of emotional harm.

Dr. Alsdurf, for example, testified how Smuda's conduct in exposing himself and masturbating in front of female staff communicated to the staff that Smuda was willing to "ignore rules and ignore any kind of appropriate behavior," and that there was a "sense of threat" attached to the behavior that "can really be quite tormenting and persistent for

people." Dr. Alsdurf ultimately opined that he believed Smuda had engaged in a course of harmful sexual conduct. This testimony was credited by the district court and supports the finding that Smuda engaged in a course of harmful sexual conduct. As an appellate court, we defer to the credibility determinations of the district court and may not engage in reweighing evidence. *Stone*, 711 N.W.2d at 839.

Finally, we note that Smuda has mostly been confined either in prison or in a secure hospital setting since he was convicted of the sexual assault of T.Y. He thus lacked the opportunity to commit additional "hands-on" assaults. *See In re Pirkl*, 531 N.W.2d 902, 909-10 (Minn. App. 1995) (concluding individual who had been in prison for nine years and thus had no recent sexual assaults, was nevertheless found to be at high risk for committing future sexual violence if returned to the community), *rev. denied* (Minn. Aug. 30, 1995). And his sexual conduct directed at female staff while confined was consistent for over a decade, supporting the finding that it constituted a "course" of conduct. We therefore conclude that the record supports the district court's determination that Smuda engaged in a course of harmful sexual conduct.

B. Sexual, Personality, or Other Mental Disorder or Dysfunction

The second requirement for commitment as an SDP is that the individual "has manifested a sexual, personality, or other mental disorder or dysfunction." Minn. Stat. § 253D.02, subd. 16(a)(2). The statute does not require that "the person has an inability to control the person's sexual impulses." *Id.*, subd. 16(b) (2020). Rather, the mental disorder or dysfunction must prevent the individual from exercising adequate control over his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 876-78 (Minn. 1999) (*Linehan IV*).

On the second requirement, the district court found that "[b]oth doctors credibly opined and testified that Smuda has mental, sexual, or personality disorders or dysfunctions within the meaning of the statute and that he lacks adequate control of his sexual impulses." Dr. Alsdurf diagnosed Smuda with "Schizoaffective Disorder, Bipolar Type; Paraphilia, NOS, and Non-consenting, Sadistic, Exhibitionist, and Coprophilic Features; Antisocial Personality Disorder, with Additional Narcissistic Features; Alcohol Use Disorder by History; Cannabis Use Disorder by History; Cannabis-Induced Psychotic Disorder; Brief Psychotic Disorder by History; and Hypersexuality." He also noted that Smuda exhibits "extreme dysregulation when presented with opportunities to act out sexually no matter how inappropriate or aggressive." Dr. Gilbertson similarly diagnosed Smuda with a history of coprophilia, a history of indecent exposure and paraphilic exhibitionism, antisocial personality features, and substance-use disorders, and acknowledged that they impacted his sexual behavior. This credited testimony supports the district court's finding, and we therefore discern no error in the district court's determination that Smuda met the second requirement for commitment as an SDP.

C. Highly Likely to Engage in Future Harmful Sexual Conduct

To satisfy the third requirement for commitment as an SDP, the person must be "highly likely" to engage in acts of harmful sexual conduct in the future. *Ince*, 847 N.W.2d at 20-22. To determine whether a person is highly likely to reoffend, a district court must engage in a "multi-factor analysis." *Id.* at 23. The multi-factor analysis includes consideration of the following six factors, known as the *Linehan* factors:

> (a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used violence in the past; and (f) the person's record with respect to sex therapy programs.

Id. at 22 (quoting *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). The multi-factor analysis may include other relevant evidence and information and includes the actuarial-assessment evidence used by the experts. *Id*. at 24. No single factor is determinative. *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *rev. denied* (Minn. Aug. 24, 2011).

Here, the district court made findings on each of the *Linehan* factors. The district court ultimately found that the factors all supported a finding that Smuda was highly likely to engage in future harmful sexual conduct. Both examiners also addressed the *Linehan* factors in their reports, and the district court credited the opinions of the examiners that Smuda was at a high likelihood to reoffend.

Smuda argues that the record does not support the district court's finding because Dr. Gilbertson testified that one of the instruments, the Static-99R, "was not able to make any prediction as to Mr. Smuda's likelihood to reoffend." His argument focuses on the third *Linehan* factor—the base rate statistics of violent behavior among other individuals of the same background. But when addressing this factor, the district court specifically

credited Dr. Alsdurf's conclusion that such statistics do "predict a high likelihood to reoffend in the future." The district court found Dr. Alsdurf particularly credible and persuasive "due to his use of multiple methods of risk assessment, knowledge of the instruments, and cohesion of his opinion." *Knops*, 536 N.W.2d at 620 (stating that we defer to the district court's credibility determinations).

The district court's determination is thus supported in the record and we therefore affirm the district court's conclusion that Smuda met the statutory criteria for civil commitment as an SDP.

II. The record also supports Smuda's commitment as an SPP.

Smuda next challenges the district court's determination that he met the statutory criteria for commitment as an SPP. To commit a person as an SPP, the state must prove by clear and convincing evidence that the person (1) has such "conditions of emotional instability," impulsive behavior, "lack of customary standards of good judgment," "failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters"; (2) has "a habitual course of misconduct in sexual matters"; (3) has "an utter lack of power to control" his sexual impulses; and (4) "as a result, is dangerous to other persons." Minn. Stat. § 253D.02, subd. 15 (2020). Smuda argues that the district court clearly erred in concluding that he has "an utter lack of power to control" his sexual impulses.[4]

[4] Smuda further argues that the record does not support the district court's determination that he engaged in "a habitual course of misconduct in sexual matters." Smuda combined

Minnesota caselaw has identified factors to consider in determining whether a person has an "utter lack of power to control" his sexual impulses, including:

> the nature and frequency of the sexual assaults, the degree of violence involved, the relationship . . . between the offender and the victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and such other factors that bear on the predatory sex impulse and the lack of power to control it.

In re Blodgett, 510 N.W.2d 910, 915 (Minn. 1994). Other caselaw factors include the person's need for security, chemical-dependency issues, history of flight, and need for sex-offender treatment. *See Pirkl,* 531 N.W.2d at 907-08; *In re Irwin,* 529 N.W.2d 366, 375 (Minn. App. 1995), *rev. denied* (Minn. May 16, 1995); *In re Bieganowski,* 520 N.W.2d 525, 529-30 (Minn. App. 1994), *rev. denied* (Minn. Oct. 27, 1994).

The district court analyzed the relevant factors and found that the factors supported the determination that Smuda had an "utter lack of power to control" his sexual impulses. The district court noted that Smuda continued to act out sexually even while being confined. The district court's conclusions are supported by the testimony of both examiners, whose testimony the district court found to be "credible and persuasive" on this issue.

We note that Smuda challenges the district court's reliance on Dr. Alsdurf's opinion on the grounds that he believes Dr. Alsdurf's opinion failed to place proper weight on the

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this argument with his assertion that the record does not support the determination that he engaged in a course of harmful sexual conduct for purposes of commitment as an SDP. We reject this argument for the same reasons expressed in section I.A. of this opinion.

facts that are helpful to Smuda. But as noted above, it is not for this court to reweigh credibility determinations made by the district court. *Knops*, 536 N.W.2d at 620; *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *rev. denied* (Minn. June 20, 2017). We therefore defer to the district court's determination that Dr. Alsdurf's testimony was credible.

Finally, the district court did not just rely on the expert reports in reaching its conclusion. The court, for example, expressed concern at Smuda's lack of any insight into his condition and how quickly he went off his medications and decompensated after his release back into the community from his commitment at NDSH.[5] It took less than three months before Smuda's condition deteriorated to the point that his mother called law enforcement and requested that he be placed on an emergency psychiatric hold. The district court found that Smuda "minimized his behavior when he was off his medications in the community in 2019" and that, less than three months after his release from NDSH, "he was out of control, had a knife, and was stabbing appliances in his mother's house." The district court also found it concerning that Smuda denied his history of sexual assaults at trial, and refused to acknowledge that he is a sex offender or poses any risk of reoffense.

Based on the evidence in the record, we discern no error by the district court in concluding that Smuda met the statutory criteria for civil commitment as an SPP.

Affirmed.

[5] The district court specifically noted that "it only took Smuda two or three weeks to stop taking his medications" after his release from NDSH. This occurred despite committing in his own relapse prevention plan that he would stay on his medications.