

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

Special Assistant State's Attorney for Richland County, Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.....	¶1
STATEMENT OF FACTS AND PROCEEDINGS.....	¶4
ARGUMENT.....	¶9
I. STANDARD OF REVIEW.....	¶10
II. HEHN HAS NOT SHOWN THAT THE STATE HOSPITAL WITHHELD TREATMENT FROM HIM OR THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED.....	¶14
A. There is no record that the State Hospital withheld treatment from Hehn	¶15
B. Hehn did not raise the issue at the trial court.....	¶18
III. HEHN HAS NOT PROPERLY RAISED A PROCEDURAL DUE PROCESS CLAIM.....	¶22
CONCLUSION.....	¶42

TABLE OF AUTHORITIES

<u>Beck v. Wilson</u> , 377 F.3d 884 (8th Cir. 2004)	¶20
<u>Bell v. Wolfish</u> , 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).....	¶21
<u>City of Revere v. Massachusetts General Hospital</u> , 463 U.S. 239 (1983)	¶21
<u>In re G.R.H.</u> , 2011 ND 21, 793 N.W.2d 460	¶21
<u>In Re Hoff</u> , 2013 ND 68, 830 N.W.2d 608	¶¶33, 35
<u>Ingraham v. Wright</u> , 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).....	¶21
<u>Matter of G.R.H.</u> , 2006 ND 56, 711 N.W.2d 587	¶12
<u>Matter of G.R.H.</u> , 2008 ND 222, 758 N.W.2d 719	¶11
<u>Matter of Hehn</u> , 2008 ND 36, 745 N.W.2d 631	¶5
<u>Matter of Hehn</u> , 2012 ND 191, 821 N.W.2d 385	¶6
<u>Matter of Hehn</u> , 2013 ND 191, 838 N.W.2d 469	¶7
<u>Matter of Midgett</u> , 2009 ND 106, 766 N.W.2d 717	¶12
<u>Matter of Vantreece</u> , 2009 ND 152, 771 N.W.2d 585	¶¶11, 12
<u>State ex rel. North Dakota Dept. of Labor, for Benefit of Fair Housing of Dakotas v. Riemers</u> , 208 ND 191, 757 N.W.2d 50	¶19

<u>State v. Vondal,</u> 2011 ND 186, 803 N.W.2d 578	¶¶32
<u>Youngberg v. Romeo,</u> 457 U.S. 307 (1982)	¶¶20

STATUTES

Eighth Amendment, U.S. Constitution.....	¶¶21
Fourteenth Amendment, U.S. Constitution	¶¶20
N.D. Const. Art. I, § 11	¶¶21
N.D.C.C. § 25-03.3-01(8)	¶¶12
N.D.C.C. 25-03.3-13	¶¶16
N.D.C.C. ch. 25-03.3.....	¶¶21

OTHER AUTHORITY

N.D.R. Civ. P. 4(d)	¶¶26, 28
N.D.R. Civ. P. 45(b)(1)	¶¶28
N.D.R. Civ. P. 45(b)(1)(B)	¶¶28
N.D.R. Ct. 3.2.....	¶¶30

[¶1] STATEMENT OF THE ISSUES

- [¶2]1. HEHN HAS NOT SHOWN THAT THE NORTH DAKOTA STATE HOSPITAL WITHHELD TREATMENT FROM HIM OR THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED.**
- [¶3]2. HEHN HAS NOT PROPERLY RAISED A PROCEDURAL DUE PROCESS CLAIM**

[¶4] STATEMENT OF FACTS AND PROCEEDINGS

[¶5] Darl John Hehn (Hehn) was originally committed as a sexually dangerous individual in November of 2006. Hehn appealed that decision to the North Dakota Supreme Court, which affirmed his commitment. Matter of Hehn, 2008 ND 36, 745 N.W.2d 631. The following history appears in that opinion:

[¶2] In April 1997, Hehn pled guilty to two counts of gross sexual imposition and one count of terrorizing. The charges and convictions were based on an incident involving Hehn's 17-year-old former girlfriend. In May 1996, Hehn took his former girlfriend from her home at gunpoint, sexually assaulted her, and then forced her to have sex with him. Hehn was sentenced to 16 years in prison, with 8 years suspended, for the two counts of gross sexual imposition ("GSI") and to an additional five years, to run concurrently with the GSI sentences, for his terrorizing conviction.

[¶3] In June 2003, Hehn was released from prison on supervised probation. He returned to Wahpeton for the probationary period. Heidi Arnholt served as his probation officer. During the course of his probation in Wahpeton, eleven reports regarding Hehn's conduct were filed with Arnholt or the area police department. Several complaints alleged Hehn treated an employee at the public library poorly. Two other reports alleged Hehn walked or drove behind pre-adolescent and teenage girls. One report from the school principal alleged that Hehn's car was seen parked near the high school. Several other complaints came from witnesses who were concerned after they saw Hehn walking through their backyards. Another report provided that Hehn sent a flirtatious email to a girl, who was at or just under eighteen years old, asking her to marry him. Another complaint came from a "youthful looking" twenty-year-old employee at West Acres Mall, who said Hehn came into the store and gave her a sexually inappropriate letter. Several lay witnesses and Arnholt testified about the community complaints.

[¶4] Hehn remained under Arnholt's supervision until February 2004, when he was arrested for violating conditions of his probation. Hehn's probation was revoked in June 2004 when he admitted to violating conditions of probation; he was sentenced to two years with the Department of Corrections. Hehn was scheduled for discharge from the North Dakota State Penitentiary on February 12, 2006, when the petition for commitment was filed.

[¶6] The North Dakota Supreme Court affirmed the order committing Hehn as a sexually dangerous individual. After his commitment to the State Hospital, Hehn was convicted of Menacing and Criminal Mischief, and placed in the custody of the Department of Corrections and Rehabilitation in 2007. He returned to the State Hospital on November 25, 2009, to continue his SDI treatment. Hehn petitioned for release in 2010, the trial court denied the petition, and the Supreme Court eventually affirmed the decision finding Hehn was still a sexually dangerous individual. Matter of Hehn, 2012 ND 191, 821 N.W.2d 385.

[¶7] By the time of his 2011 annual review, Hehn had been demoted to Skills I, a pretreatment group, and Hehn's therapists did not believe he was making any progress in treatment. Both experts in the 2011 review, Dr. Lisota for the State and Dr. Benson as the independent expert, agreed that Darl Hehn met all criteria to remain committed as a sexually dangerous individual. Hehn appealed, and the order denying his discharge was affirmed. Matter of Hehn, 2013 ND 191, 838 N.W.2d 469.

[¶8] Rather than invest himself in treatment, Hehn has spent his time subsequent to that appeal fighting the staff and "sticking up for his patient's rights," as he calls it.

[¶9]ARGUMENT

[¶10]I. STANDARD OF REVIEW

[¶11] The North Dakota Supreme Court reviews civil commitments of sexually dangerous individuals under a modified clearly erroneous standard in which the Court will affirm a district court's order "unless it is induced by an erroneous view

of the law or we are firmly convinced [the order] is not supported by clear and convincing evidence.” Matter of Vantreece, 2009 ND 152, ¶ 4, 771 N.W.2d 585 (quoting Matter of G.R.H., 2008 ND 222, ¶ 7, 758 N.W.2d 719).

[¶12] At a discharge hearing, the State has the burden of proving by clear and convincing evidence the committed individual remains a sexually dangerous individual. Matter of Midgett, 2009 ND 106, ¶ 6, 766 N.W.2d 717. N.D.C.C. § 25-03.3-01(8) defines a “sexually dangerous individual” to mean “an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that 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.” See Matter of Vantreece, 2009 ND 152, ¶ 6, 771 N.W.2d 585; Matter of G.R.H., 2006 ND 56, ¶ 6, 711 N.W.2d 587.

[¶13] Hehn does not challenge the trial court’s findings that he remains a sexually dangerous individual. Rather he raises two new constitutional challenges he did not raise in the trial court: that by “withholding treatment” from Hehn, the North Dakota State Hospital violated his substantive due process rights and right to be free from cruel and unusual punishment; and by allowing Hehn to remain handcuffed during the discharge hearing, the trial court violated his procedural due process rights.

[¶14]II.HEHN HAS NOT SHOWN THAT THE STATE HOSPITAL WITHHELD TREATMENT FROM HIM OR THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED.

[¶15] A. There is no record that the State Hospital withheld treatment from Hehn.

[¶16] Hehn claims, "Hehn has been civilly committed since 2006, yet the State Hospital has denied him treatment for the majority of that time in contravention to the statutorily mandated treatment in the least restrictive manner, pursuant to N.D.C.C. 25-03.3-13, and in violation of his right to substantive due process and freedom from cruel and unusual punishment." (Hehn appellant's brief ¶11). The evidence is contrary to Hehn's claim and shows that the treatment is available to him, yet he refuses to follow even the basic rules that allow the State Hospital to maintain discipline. Because of his behavioral problems, Hehn keeps getting demoted back to the lowest stage, and then has to do homework assignments he has already completed. His frustration was eventually his own undoing. Hehn intentionally violated the law, attempting to go back to prison:

MR. BYERS: When you were in this mind set where you decided you were going to try to get sent back to prison—

MR. HEHN: Yes.

MR. BYERS: --you had to understand that the conduct you were going to have to do to get back to prison was going to ruin your treatment progress. Right?

MR. HEHN: Yes, I did.

MR. BYERS: So you made that conscious decision?

MR. HEHN: Well, I didn't think they were going to keep me in the damn Core for 9 months though, either. I thought I was going to be able to go right to county jail like – I mean, that's normally what happens.

MR. BYERS: But even if you weren't in Core you were going to be in Skills I and they probably – you had to think they're not going to jump me up to Secure Two right away and let you be—

MR. HEHN: No. I was on Skills I at that time. I figured I'm going to break the law. I'm tired of this shit. I'm going back to prison. I'll just sit there. It would be better.

(August 14, 2014, transcript, p. 161, lines 7-25).

[¶17] Rather than the State Hospital withholding treatment, Hehn's own conduct and decisions resulted in him not advancing in treatment.

[¶18] **B. Hehn did not raise the issue at the trial court.**

[¶19] When given an opportunity to make an opening statement, Hehn's counsel first reserved it and then waived it. (August 14, 2014, transcript pp. 5 and 106). Closing arguments were submitted in writing. Hehn did not allege in his closing argument that the State Hospital withheld treatment from him, or that such conduct violated any of his constitutional rights. (Docket #272) "It is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment." State ex rel. North Dakota Dept. of Labor, for Benefit of Fair Housing of Dakotas v. Riemers, 2008 ND 191, ¶ 27, 757 N.W.2d 50.

[¶20] The applicable standard is, in part, under Youngberg v. Romeo, 457 U.S. 307 (1982). Under Youngberg, a civilly committed individual has constitutionally protected interests under the due process clause of the Fourteenth Amendment to reasonably safe conditions of confinement, including "adequate food, shelter, clothing, and medical care" and "reasonable safety." Id. at 324. "In determining whether the State has met its obligations in these respects, decisions made by

the appropriate professional are entitled to a presumption of correctness.” Id. And “[b]efore official conduct or inaction rises to the level of a substantive due process violation[,] it must be so egregious or outrageous that it is conscience-shocking.” Beck v. Wilson, 377 F.3d 884, 890 (8th Cir. 2004). State Hospital decisions regarding Hehn’s care are presumptively correct.

[¶21] Commitment of a sexually dangerous individual under N.D.C.C. ch. 25-03.3 is civil in nature, it is not punitive. See In re G.R.H., 2011 ND 21, 793 N.W.2d 460. Hehn’s commitment as a sexually dangerous individual is not punishment and the cruel and unusual punishments clauses of the Eighth Amendment or Article I, Section 11 of the North Dakota State Constitution do not apply to his civil commitment. “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.” Ingraham v. Wright, 430 U.S. 651, 671–672, n. 40, 97 S.Ct. 1401, 1412-1413, n. 40, 51 L.Ed.2d 711 (1977); see Bell v. Wolfish, 441 U.S. 520, 535, n. 16, 99 S.Ct. 1861, 1872, n. 16, 60 L.Ed.2d 447 (1979). “Because there had been no formal adjudication of guilt against Kivlin at the time he required medical care, the Eighth Amendment has no application.” City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983).

[¶22]III. HEHN HAS NOT PROPERLY RAISED A PROCEDURAL DUE PROCESS CLAIM.

[¶23] Hehn first claims that the trial court's failure to order the State Hospital to provide witnesses and other evidence violated his procedural due process rights. Hehn fails to provide an accurate record of the proceedings so that an appellate court can make a reasoned decision.

[¶24] The discharge hearing was first scheduled for April 17, 2014. Hehn requested a continuance, citing as one reason that he wished to conduct further discovery and schedule depositions of a number of witnesses. The Petitioner asked Hehn to indicate whether he intended the discharge hearing to be an indictment of the State Hospital treatment program, and he indicated that was not his intent, but would provide notice if that changed.

[¶25] Over three and one half months passed with no activity from Hehn. On August 6, 2014, just over a week prior to the discharge hearing, Hehn filed a Subpoena Duces Tecum on counsel for the Petitioner. (Docket #252). It was not served on the State Hospital. The subpoena requested voluminous records from the State Hospital, including "all write-up forms created in regard to alleged misbehavior or violations by Darl John Hehn"; "hospital-wide policies/rules and each secure services unit's policies/rules, and Patient's Rights documents"; "credentials for all NDSH employees who have ever provided treatment or direct residential care to Darl John Hehn"; "any and all scoring guidelines used in the sex offender treatment evaluation program"; and "all of Darl John Hehn's grievance forms, responses to those grievances, and any and all actions taken in

regards to those grievances.” There were a total of nine categories of documents requested.

[¶26] North Dakota Rules of Civil Procedure 4(d), requires personal service of the subpoena on the administrative head of the agency or upon the Attorney General or an assistant attorney general. Electronically mailing the subpoena via the Odyssey electronic filing system to the opposing attorney (who is in fact acting as a Special Assistant States Attorney for Richland County) does not qualify as delivering the subpoena in accordance with Rule 4(d).

[¶27] The subpoena was issued the night of August 6, 2014, and demanded production of an extraordinarily voluminous amount of records by 5:00 p.m. on August 12, 2014. The subpoena’s own terms allowed an objection to be filed within 10 days of the receipt of the subpoena, which would not be until after the discharge hearing.

[¶28] On August 7, 2014, one week before the discharge hearing, Hehn filed ten subpoenas for the appearance of State Hospital staff and SDI committed individuals via the Odyssey system. None of them were served on the persons whose appearance was requested, as required by N.D.R. Civ .P. 4(d), No witness fees mileage, or travel expenses were tendered as required by N.D.R. Civ. P. 45(b)(1). If the fees are not tendered with the subpoena, the person need not obey the subpoena. N.D.R. Civ. P. 45(b)(1)(B).

[¶29] With the 10 subpoenas, Hehn filed a proposed order to transport witnesses, listing three of the SDI committed individuals that he wanted the court to order transported from the North Dakota State Hospital. A telephonic hearing

was held on August 11, 2014, at which the trial court was advised of the lack of service of the subpoenas and the undue burden that would be created by the State Hospital having to provide enough staff to transport and supervise three sexually dangerous individuals from Jamestown to Wahpeton. Hehn has not requested a transcript of the telephonic hearing, so there is an inadequate record on appeal.

[¶30] On August 12, 2014, Hehn filed a motion for five SDI committed individuals to appear by telephone at the discharge hearing. Hehn did not file a brief with the motion, serve a notice of motion, or request a hearing date on the motion, all as required by N.D.R. Ct. 3.2. When it came time for Hehn to call a witness on August 14, 2014, Hehn could not even provide phone contact information to the trial court. When the trial court asked Hehn to make an offer of proof what the testimony of the witness would be, attorney for the Petitioner indicated the Petitioner would stipulate to all of the matters in the offer of proof. (August 14 transcript, p. 172, lines 1-20).

[¶31] Beyond the offer of proof, the trial court indicated it was not going to re-litigate all of the disciplinary write-ups that Hehn received at the State Hospital, and so the testimony of the other SDI individuals was not necessary. (Id. at p. 173-175). Hehn did not serve subpoenas on the State Hospital staff and did not secure their attendance at the hearing.

[¶32] Hehn has inserted an issue on appeal that he did not include in his preliminary statement of the issues. Hehn now claims it was reversible error for the trial court to keep him in handcuffs during the discharge hearing, without an

individualized determination of the need for restraints. Although Hehn did ask the court to order that his handcuffs be removed, Hehn did not cite any authority or contend that being left in handcuffs would violate his procedural due process rights. Issues that are not raised before the district court, including constitutional issues, generally will not be addressed on appeal unless the alleged error rises to the level of obvious error. State v. Vondal, 2011 ND 186, ¶ 17, 803 N.W.2d 578.

[¶33] Hehn relies on In Re Hoff, 2013 ND 68, 830 N.W.2d 608, for his argument that the trial court's failure to make any individualized findings denied Hehn due process. In Re Hoff can be distinguished for two reasons. First, Hoff's counsel raised the constitutional issue when the matter was addressed at the trial court:

THE COURT: I see what he's got, but the problem is the sheriff makes the determination whether or not they can be secured while they're here. I don't have a deputy.

MR. RUNGE: This is a denial of his due process if he cannot communicate with his attorney. And oral communication does not suffice when I have to listen to—

Id. at ¶ 3.

[¶34] Hehn does not mention the constitutional argument about having been handcuffed during the hearing in his written closing argument. Then, when the trial court conducted a telephone conference for the purpose of issuing findings, the court asked Hehn's counsel "Is there any additional record you would like to make on behalf of Mr. Hehn?" The answer was, "No, your Honor." (October 27, 2014, transcript, p. 4, lines 16-18). Hehn did not include the constitutional claim

in his preliminary issues on appeal, and the first time it appears is in his Brief of Appellant.

[¶35] Another distinguishing factor is that the majority found in In Re Hoff that “there is no suggestion on this record that Hoff presented a security risk.” The N.D. Supreme Court noted in the 2013 appeal that Hoff’s most recent conviction was in 2004, for which he received a suspended sentence. Id. at ¶ 14.

[¶36] At the time of Hehn’s discharge hearing in August 2014, the trial court and all parties had been provided a copy of Dr. Krance’s SDI Annual Re-evaluation report. (Docket #243) The report noted Hehn’s major disciplinary write-ups on January 13, 2013, for misuse or damaging property, disruptive behavior, failure to follow staff directives, and tampering with security devices. The report noted Hehn was verbally threatening and physically aggressive towards staff on March 11, 2013, for allegedly turning off the television two minutes early. (Docket #243, page 5 of 34).

[¶37] Hehn’s aggression and violence continued on March 26, 2013, with Hehn kicking doors and making threatening statements. On March 29, 2013, Hehn called staff a “bitch and stupid cunt” and said she “better bring backup when you come down here,” and then kicked the garbage can over. (Docket #243, page 6 of 34).

[¶38] On April 6, 2013, Hehn became verbally threatening and took a very aggressive stance, telling staff they would have to fight him. He took out his belt with a large buckle on it and tried to hit staff. (Docket #243, page 7 of 34). Two days later, Hehn became verbally abusive to staff about his mail. He entered a

room that was under construction in the ICU and removed a shovel and a board from the room. He began to swing these at the walls and windows in the ICU, and made threatening gestures towards staff with the shovel. Hehn took several swings at staff when staff attempted to restrain him. (Id. at page 7.)

[¶39] Hehn continued to be threatening and physically aggressive even while he was on detention status from May 2013 to January 2014, when the re-evaluation report was issued. By the time of the discharge hearing, Hehn had received convictions for disorderly conduct and menacing for his conduct at the State Hospital. He spent time at the Stutsman County Correctional Center from February 11, 2014, to March 12, 2014. By March 17, he was again verbally aggressive and threatening to staff: "I'll kick your ass you redneck fucking bitch." (Annual re-evaluation addendum, p. 2 of 18)

[¶40] Unlike Hoff, the trial court was not faced with a committed individual who had not demonstrated he was a security risk for eight or nine years. There was a clear record establishing Hehn's security risk that all parties were aware of, and no jury to be influenced by seeing Hehn in cuffs. The trial court checked to see if Hehn was able to write with the handcuffs on and concluded he was.

[¶41] Hehn has not challenged any of the trial court's findings regarding his commitment as a sexually dangerous individual. It was harmless error, if any error at all, for the trial court to fail to itemize the above history of security issues.

[¶42]CONCLUSION

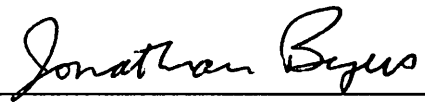
[¶43] Hehn has not challenged any of the findings that he remains a sexually dangerous individual. His lack of progress in treatment is due to his own conduct,

in large part intentional. No purpose would be served in returning the case to the district court to outline all of the security concerns that everyone was aware of. The order denying the petition for discharge should be affirmed.

Dated this 9th day of April, 2015.

RESPECTFULLY SUBMITTED:

State of North Dakota
Wayne Stenehjem
Attorney General

By: 
Jonathan R. Byers #04583
Assistant Attorney General
Office of Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505-0040
jbyers@nd.gov

Special Assistant State's Attorney
for Richland County, Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20140430

In the Matter of Darl John Hehn)	
)	
Ronald W. McBeth, Richland County)	
State's Attorney,)	
)	AFFIDAVIT OF SERVICE
Petitioner and Appellee)	BY MAIL
v.)	
)	
Darl John Hehn,)	
)	
Respondent and Appellant.)	

.....

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Vanessa K. Kroshus states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 9th day of April, 2015, I served the attached BRIEF OF APPELLEE upon Jonathan Green, by placing a true and correct copy thereof in an envelope addressed as follows:

MR JONATHAN GREEN
ATTORNEY AT LAW
522 DAKOTA AVE STE 1
WAHPETON ND 58075-4415

and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.

Vanessa K Kroshus
Vanessa K. Kroshus

Subscribed and sworn to before me
this 9th day of April, 2015

Alice M. Johnson
NOTARY PUBLIC

