

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

In the Interest of Danny Nelson	)	
	)	
Lonnie Olson, State’s Attorney,	)	Supreme Court No.: 20160113
Petitioner and Appellee,	)	District Court No.: 36-2014-MH-00023
	)	
v.	)	
	)	
Danny Robert Nelson,	)	
Respondent and Appellant.	)	
	)	

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APPEAL FROM THE DISTRICT COURT ORDERING CIVIL COMMITMENT  
DATED MARCH 8, 2016, HELD BEFORE THE HONORABLE DONOVAN  
FOUGHTY IN RAMSEY COUNTY, NORTH DAKOTA

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BRIEF OF THE APPELLANT

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## **JURISDICTIONAL STATEMENT**

Jurisdiction in this matter is pursuant to N.D. Cent. Code § 25-03.3-19. The Ramsey County District Court decided Mr. Nelson was a sexually dangerous individual on March 8, 2016. Mr. Nelson timely filed this appeal on March 24, 2016.

## STANDARD OF REVIEW

[¶ 1] A “modified clearly erroneous” standard of review is employed by this court when reviewing the civil commitment of sexual dangerous individuals under N.D.C.C. § 25-03.3. Matter of J.T.N., 2011 ND 231, ¶ 6, 807 N.W.2d 570.

## STATEMENT OF THE ISSUES

- I. Whether Mr. Nelson’s substantive due process rights are being violated when the State seeks to have Mr. Nelson committed as a sexually dangerous individual after Mr. Nelson has successfully completed the sex offender treatment program while Mr. Nelson was in prison.**
- II. Whether Mr. Nelson is a sexually dangerous individual that warrants civil commitment.**

## STATEMENT OF THE CASE

[¶ 2] Appellant, Mr. Nelson, appeals from the Findings of Fact, Conclusions of Law and Order entered by the Honorable Donovan Foughty on March 8, 2016, under N. D. Cent. Va. Code Ann. § 25-03.3. AA4.

[¶ 3] A Preliminary Hearing was held on February 6, 2015. At that time, the Court determined that there was probable cause to believe that Mr. Nelson was a sexually dangerous individual.

[¶ 4] Dr. Jennifer Krance completed an Evaluation for the State on March 26, 2015. AA 8. Dr. Robert G. Riedel completed a report as an independent evaluator for Mr. Nelson on April 25, 2015. AA 44.

[¶ 5] A hearing to determine whether Mr. Nelson was a sexually dangerous individual was held on February 6, 2015. On March 8, 2016, the Honorable entered an Order committing Mr. Nelson to the North Dakota State Hospital (herein State Hospital) as a sexually dangerous individual. AA 4. Mr. Nelson filed his Notice of Appeal on March 24, 2016. AA 105.

### **STATEMENT OF THE FACTS**

[¶ 6] On January 17, 1990, Mr. Nelson was convicted of Aggravated Assault and sentenced to three (3) years of probation. AA 8. In 1992, while on probation, Mr. Nelson entered different residences and stole lingerie. AA 9. He was convicted of four (4) counts of Theft of Property. On December 22, 2009, Mr. Nelson was convicted of Continuous Sexual Abuse of a Child. AA 10. He was sentenced to ten (10) years with the Department of Correction and Rehabilitation with three (3) years suspended. Id.

[¶ 7] While in prison, Mr. Nelson attended and successfully completed two (2) sex offender treatment programs. TH 127. Mr. Nelson completed a low intensity sex offender program on June 22, 2010. Id. He went on to complete a high intensity sex offender program graduating on April 17, 2014. Id. While in prison, Mr. Nelson completed classes on computers, First Aid, and three (3) different classes regarding intervention and relapse prevention plan. TH 128.

[¶ 8] Just before Mr. Nelson's release from prison, a Petition to declare him a sexually dangerous individual was filed. On February 6, 2015, a Preliminary Hearing was held. After that hearing, an Order was entered directing Mr. Nelson to the care, custody, and control of the North Dakota State Hospital so an evaluation could be completed.

[¶ 9] Dr. Jennifer Krance completed an evaluation of Mr. Nelson for the State on March 26, 2015. AA 8. Dr. Robert G. Riedel completed an independent evaluation for Mr. Nelson on April 25, 2016. AA 44.

[¶ 10] While at the State Hospital, waiting on the treatment hearing, Mr. Nelson took it upon himself to further his education. He enrolled in AA, SAA, and Cog classes. Mr. Nelson continued to work on his relapse prevention plan, as well as, his cycle relapse plan. TH 128.

[¶ 11] A hearing was held on January 6, 2016, to determine if Mr. Nelson should be committed as a sexually dangerous individual. A Findings of Fact, Conclusion of Law and Order was filed on March 8, 2016, holding that Mr. Nelson be committed to the care, custody and control of the Executive Director of the Department of Human Services for appropriate treatment. AA4. Mr. Nelson continues to reside at the State Hospital.

### **LAW AND ARGUMENT**

#### **I. Whether Mr. Nelson's substantive due process rights are being violated when the State seeks to have Mr. Nelson committed as a sexually dangerous individual after Mr. Nelson has successfully completed the sex offender treatment program while Mr. Nelson was in prison.**

[¶ 12] The Fourteenth Amendment Due Process Clause of the United States Constitution requires that the conditions and duration of the confinement bear some relation to the purpose for which offenders are committed. U.S. Const. amend. XIV, § 1. The Fourteenth Amendment also requires state officials to provided civilly committed persons with aces to mental health treatment which gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. This rule applies to sex

offenders, and the lack of funds, staff, or facilities cannot justify that State's failure to provide those confined with that treatment necessary for rehabilitation. Those offenders civilly committed under the statute are not prisoners, and therefore they are entitled by law to more considerate treatment and conditions of confinement than criminal whose conditions of confinement are designed to punish. See Kan. v. Hendricks, 521 U.S. 346 (1997); Lindh v. Murphy, 117 S. Ct. 2059 (1997).

[¶ 13] The North Dakota Supreme Court has held that proof of a nexus between the requisite disorder and dangerousness encompasses proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual offender whose disorder subjects him to civil commitment for the dangerous, but typical recidivist in the ordinary criminal case. Civil commitment cannot be characterized as punitive. It cannot implicate either of the two primary objectives of punishment- retribution or deterrence. Due process requires that the conditions and durations of confinement bear some relation to the purpose for which offenders are committed. See Memorandum for the N.D. Legislative Counsel staff for the Budget Committee on Government Services entitled "Civil Commitment of Sexually Dangerous Individuals-Treatment Requirements, <http://www.legis.nd.gov/assembly/59-2005/docs/pdf/79249.pdf> (May 2006). In addition, "...trial courts must be mindful that proceedings for commitment as a sexually dangerous person, although civil in nature, implicate the liberty interests of the person sought to be committed." In re M.D., 1999 ND 160, ¶ 18; Grosinger v. M.D. (In re M.D.), 598 N.W.2d 799 (N.D. 1999). "The deprivation of liberty resulting from commitment as a sexually dangerous individual can, in many cases, be greater than that imposed as a criminal sanction for the underlying sexually predatory conduct which brought the individual to the



State's attention." In re J.M., 2006 ND 96, ¶ 11; Feland v. J.M., 713 N.W.2d 518 (N.D. 2006).

[¶ 14] Mr. Nelson worked hard at his treatment while at the North Dakota State Penitentiary. Mr. Nelson completed a low intensive sex offender treatment program on June 22, 2010. TH 127. Mr. Nelson then participated and completed a high intensity sex offender treatment program on April 17, 2014. TH 127. This program consists of fifty (50) lessons twice a week. Each lesson lasts 90-120 minutes long and the program goes for a time period of six and a half months. The program emphasizes the identification of high risk situations, thinking, feelings, actions, and consequences. The participants develop thinking, feelings, and skills that may be implemented in high risk situations to produce more positive outcomes. Group members complete a comprehensive success plan that directs their continued skills practice as they **transition back to their home communities**. Emphasis added. This information came from Ms. Lisa Peterson, Clinical Director of the ND DOCR. Docket # 39; TH 105-107. Dr. Sara Durbin testified for the State at the Preliminary Hearing that after Mr. Nelson completed both the low intensive and high intensive sex offender programs, he participated in the maintenance group up until his release from prison. PH 14.

[¶ 15] After the Preliminary Hearing Mr. Nelson was transferred to the State Hospital. While there, he entered the sex offender maintenance group. Mr. Nelson also continued working on his relapse prevention plan. TH 127. The relapse prevention plan is intended to assist an individual with cognitive and behavioral skills to assist in decision making, aide in escape or avoiding behaviors to reoffend. He has also been participating in AA and SAA groups and gaining other skills to help him succeed in mainstream society. Feland,

713 N.W.2d 518 Mr. Nelson continued with his aftercare while waiting on the treatment hearing. Normally, people waiting for a court determination of whether they are a sexually dangerous individual do not receive treatment. They are housed at the State Hospital until a court enters an Order. Mr. Nelson took the initiative and continued his maintenance program as he would if he had just been released from prison and placed on parole and probation.

[¶ 16] When Dr. Krance was asked on cross examination regarding the effort and skills that Mr. Nelson had been working on while at the State Hospital waiting on the treatment hearing, she was unaware of Mr. Nelson's continuing maintenance because it was not documented in the file. TH 30. Dr. Krance does not do anything with the treatment program and only knows information if it is in Mr. Nelson's file. Had she taken the time to review his treatment file before the hearing, she would have known that Mr. Nelson was continuing with his aftercare.

[¶ 17] When an individual is civilly committed, he has the right to treatment which will afford him the best possible opportunity to return to society. This is what the Legislature intended when they made the North Dakota Commitment statute a rehabilitative measure instead of a punitive one. The Legislature made a clear delineation between criminal punishment and civil rehabilitation.

[¶ 18] Mr. Nelson is not being afforded the right to treatment which will afford him the best possible opportunity to return to society if he is committed to the State Hospital. The sex offender treatment that Dr. Krance is recommending at the State Hospital to Mr. Nelson is unnecessary and repetitive. Dr. Krance acknowledges that the purpose of both the high intensive treatment program already completed by Mr. Nelson and the program Mr. Nelson

would complete at the State Hospital is the same. An individual must learn their triggers and how to adapt in the community.

[¶ 19] Mr. Nelson has received the appropriate tools while in prison to return to the community. He will be on supervised probation for a period of time which will monitor him. The State of North Dakota has a statutory duty and obligation to afford Mr. Nelson appropriate and effective treatment. That treatment was successfully completed while Mr. Nelson was incarcerated. Any treatment at the State Hospital would just be repetitive. Mr. Nelson has demonstrated ability to control and to learn to control his actions. He continues with his maintenance plan and will continue to do so while on probation.

[¶ 20] Dr. Riedel said it best. If Mr. Nelson were civilly committed, he would basically be repeating the same program over again. It's like graduating the 8<sup>th</sup> grade and going back to 3<sup>rd</sup> grade. TH 108. Mr. Nelson would not gain anything by repeating the same treatment program with a new group of people and a new therapist.

## **II. Whether Mr. Nelson is a sexually dangerous individual that warrants civil commitment.**

[¶ 21] N.D. Cent. Code § 25-03-3 requires the State to prove three prongs to have an individual committed as a sexual dangerous individual. The prongs are: (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, 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 D.W., 2016 ND 156, ¶ 7; see also Interest of Corman, 2014 ND 88, ¶ 8, 845 N.W.2d 335.

[¶ 22] The North Dakota Supreme Court in In re Hehn, stated “in addition to the three requirements contained in the plain language of the statute and this Court’s definition of ‘likely to engage in further acts of sexually predatory conduct,’ the United States Supreme Court held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior.” In re Hehn, 2008 ND 36, ¶ 19, 745 N.W.2d 631.

[¶ 23] N.D. Cent. Code § 25-03.3-01 does not establish what constitutes a failure to control one’s behavior. Under North Dakota law, a person is “likely to engage in further acts of sexually predatory conduct” if the individual's propensity towards sexual violence is of such a degree as to pose a threat to others.” In re M.B.K., 2002 ND 25, ¶ 18, 639 N.W.2d 473. The District Court must specifically state the facts on which it relied to determine an individual has serious difficulty controlling his behavior. Interest of Johnson, 2015 ND 71, 861 N.W.2d 484.

[¶ 24] Dr. Krance’s evaluation states Mr. Nelson continues to demonstrate serious difficulty controlling his behavior and his ability to control would likely be worse in a less restrictive environment. Dr. Krance points to the fact that Mr. Nelson had trouble on probation in the past. TH 13, 27, 37. In the past, Mr. Nelson had trouble on probation, but the circumstances have changed since that time. Mr. Nelson has successfully completed both the low intensity and high intensity sex offender treatment in prison. He has been active in aftercare and diligently working on preventive maintenance. Mr. Nelson has been working on his sexual assault cycle and his relapse prevention plan. TH 30, 128. Mr. Nelson is actively participating in AA and SAA groups. Id. at 128. Mr. Nelson believes he

has learned the proper techniques and feels he is no longer a danger to the community. TH 38.

[¶ 25] In addition, Dr. Krance believes that Mr. Nelson should be committed so he could obtain a better understanding of the high intensity program that he successfully completed. TH 34-35, 61-62. This is ridiculous. The program Mr. Nelson completed gets the offender ready to transition back into the community. If the program offered at the prison did not do that, then every person that completed the program in prison would have to complete the program at the State Hospital before being released back into the community. The ND DOCR would not have a sex offender program that would not benefit individuals and get them ready to return to society. If the ND DOCR did not believe that Mr. Nelson was ready to transition back into the community, they would not have allowed him to graduate the program.

[¶ 26] Dr. Krance does not like that there are inconsistencies in the police report and with Mr. Nelson's own statements to her. TH 15-16. What was problematic to Dr. Krance was the concept that Mr. Nelson stated he did not "break" into the people's homes, but merely entered an unlocked door. TH 60. As a lay person, Mr. Nelson does not understand the legal concept of "breaking and entering." Mr. Nelson admitted that entering the unlocked door was wrong, but does not understand the legal jargon.

[¶ 27] Dr. Krance does not like the fact that Mr. Nelson is presenting a pattern of offending as consensual or mutual. However, Dr. Krance admitted that Mr. Nelson had taken 100% responsibility for his offenses. TH 12. Dr. Krance was having difficulty understanding that some of the paperwork had the victim as 9 years old and on other paperwork it was 11 years old. Mr. Nelson said he believed the victim was 11 years old at that time. However,

Dr. Krance admitted on cross examination that Mr. Nelson was explaining how he felt at the time the offenses were committed, and not at the present time, and not after completing his sex offender classes.

[¶ 28] Another problem that Dr. Krance had is that when she asked Mr. Nelson his risk level to re-offend, he rated himself quite low. Dr. Krance goes on to explain that part of treatment is to learn skills and treatment concepts that will help an individual manage these behaviors and urges in the community, but for an individual to say they are low risk is not acceptable.

[¶ 29] Dr. Riedel has determined that there is no reasonable degree of scientific and professional certainty that Mr. Nelson would engage in future acts of sexually predatory conduct and it is not clinically defensible to conclude that he remains classified as a sexually dangerous individual.

[¶ 30] Dr. Riedel spoke to the individual in charge of the sex offender treatment programs at both James River and at the North Dakota State Hospital. Both programs are very similar in terms of content and in terms of what they teach. TH 104-108. They both get individuals ready to return to the community with the proper techniques to address any feelings or desires.

[¶ 31] Dr. Riedel was impressed with the effort and determination that Mr. Nelson put toward his treatment. He was particularly impressed by the way Mr. Nelson went out of his way to get additional certificates. He was also impressed that Mr. Nelson went on to become not only a model person in the program, but excelled to become a mentor. TH 107. As a mentor, Mr. Nelson was working with group leaders to help others that were having

problems with the program. Mr. Nelson was helping others with the same problems he was experiencing in the beginning of treatment. Id.

[¶ 32] Mr. Nelson is unlikely to reoffend and is not a danger if released into the community. An analysis of Mr. Nelson's past criminal history, alone, is not enough on the issue whether Mr. Nelson remains a sexually dangerous individual. Interest of Johnson, 2015 ND 71, ¶ 9, 861 N.W.2d 484; see also Interest of Graham, 2013 ND 171, ¶ 14, 837 N.W.2d 382.

[¶ 33] Dr. Krance acknowledged that Mr. Nelson could possibly complete probation since completing the treatment programs. The least restrictive alternative must be used. Mr. Nelson has demonstrated the ability to understand his triggers and how to cope with them in the community. Mr. Nelson does not pose a risk to the community and is not likely to engage in further acts of sexually predatory conduct. Mr. Nelson does not meet the criteria of a sexually dangerous individual.

[¶ 34] The district court must specifically state the facts on which it relied to determine an individual has serious difficulty controlling his behavior. Interest of Johnson, 2015 ND 71, 861 N.W.2d 484. The district court did not state any facts it relied upon to reach its conclusion. The court only stated that it found the testimony of Dr. Krance more persuasive. Should this Court not release Mr. Nelson to probation, this Court has no option but to remand the case to the district court for precise findings it made in determining that Mr. Nelson had serious difficulty controlling his behavior. Once that is done, a proper appeal may be done.

## CONCLUSION

[¶ 35] The State has failed to prove by clear and convincing evidence Mr. Nelson will engage in further acts of a sexually predatory nature; and, therefore, has not proven Mr. Nelson to be a sexually dangerous individual as required under N.D. Cent. Code § 25-03.3-01(8). Therefore, we respectfully request that this Court release Mr. Nelson immediately to supervised probation where it is recommended that Mr. Nelson continue with his maintenance program. In the alternative, this Court must remand this case to the district court to have them state specifically what facts it relied upon to determine that Mr. Nelson had serious difficulty controlling his behavior.

Respectively submitted on September 2, 2016.

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	)	
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<b>Danny Robert Nelson, Respondent and Appellant.</b>	)	
	)	
	)	

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**CERTIFICATE OF SERVICE**

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I, **David D. Dusek**, do hereby certify that on September 2, 2016, I served the following document:

1. Brief of the Appellant
2. Appendix of the Appellant

in PDF format upon the following:

Mr. Lonnie Olson  
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

by United States Mail upon the following:

Mr. Danny R. Nelson  
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Dated this 2<sup>nd</sup> day of September, 2016.

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