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SEP 27 2016

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF DANNY ROBERT NELSON

Lonnie Olson,)

State's Attorney,)

Petitioner/Appellee,)

vs.)

Danny Robert Nelson,)

Respondent/Appellant.)

Supreme Court No. 20160113
Dist. Court No. 36-2014-MH-00023

APPEAL FROM THE DISTRICT COURT ORDERING CIVIL COMMITMENT

BRIEF OF APPELLEE

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RAMSEY COUNTY STATES ATTORNEY
DEVILS LAKE, NORTH DAKOTA

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RAMSEY COUNTY STATES ATTORNEY
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STATEMENT OF THE ISSUES

1. Did the trial court err in determining that Mr. Nelson is a sexually dangerous individual?

2. Does commitment as a Sexually Dangerous Individual after completing a sex offender treatment program in prison, constitute a violation of his substantive due process rights?

RAMSEY COUNTY STATES ATTORNEY
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STATEMENT OF THE FACTS

1
2 ¶1 In 1990, Mr. Danny Nelson was convicted of aggravated
3 assault and sentenced to three years probation. Appendix at
4 page 8. (Hereinafter App.8.) While on probation, Mr. Nelson
5 entered the residences of a number of women in Cavalier County
6 and stole underwear, teddies, panties, a number of women's
7 undergarments, including bras. He also apparently stole a .22
8 pistol. App.9. Mr. Nelson used the stolen underwear for
9 masturbation purposes, justifying it in his own mind due to
10 the fact that his first wife had gained weight and he was no
11 longer sexually attracted to her. Transcript at page 25,
12 lines 6-11. (Hereinafter Tr.25, lines 6-11.)

13
14 ¶2 On December 22, 2009, Mr. Nelson was convicted of
15 continuous sexual abuse of a child, and sentenced to ten years
16 with the Department of Corrections, with three years
17 suspended. App.8. The victim indicated that she had sexual
18 intercourse with Mr. Nelson numerous times between the ages of
19 nine and fifteen. App.10. It began with intercourse in third
20 or fourth grade, and ended in seventh or eighth grade. Id.
21 The victim estimated that they had intercourse thirty to forty
22 times, but was unsure of the exact amount. Id.

23
24 ¶3 While in prison, Mr. Nelson attended and successfully
25 completed a low intensity sex offender program on June 22,
26 2010. Tr.127. Just prior to his release from prison, a
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28

1 petition to commit Mr. Nelson was filed in Ramsey County
2 District Court, seeking the commitment of Mr. Nelson pursuant
3 to N.D.C.C., Chapter 25-03.3.
4

5 ¶4 The State presented expert testimony by Dr. Jennifer
6 Krance from the North Dakota State Hospital regarding the
7 commitment of Mr. Nelson. Tr.5. Dr. Krance's report and
8 evaluation was offered as an exhibit and accepted by the
9 Court, and if found in the App.8. Mr. Nelson called Dr.
10 Robert G. Riedel as an expert. Tr.74. The Respondent offered
11 Dr. Riedel's report, which was accepted into evidence, and is
12 found in the App.44. Dr. Krance assessed Mr. Nelson pursuant
13 to a two objective assessments, known as a Static-99R, and
14 PCL-R. App.43. Dr. Krance found Mr. Nelson to have high
15 scores in both objective assessments. Dr. Krance, in her
16 review of Mr. Nelson's history, and based upon her interview
17 with Mr. Nelson, came to the opinion that Mr. Nelson suffered
18 from the mental disorders of unspecified paraphilic disorder,
19 ruling out other specified paraphilic disorder, a moderate to
20 severe alcohol use disorder with narcissistic antisocial
21 personality traits. App.33.
22

23
24 ¶5 Dr. Krance testified about Mr. Nelson's alcohol use
25 disorder based upon his history. Tr.22, lines 3-4. She noted
26 alcohol usage being present during the offenses at one point
27 or another. Id. Further, Dr. Krance found the unspecified
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1 paraphilic disorder was appropriate and specified it to
2 include not otherwise specified with fetishistic and
3 hebephilia attached. Id. at line 17. She noted the
4 fetishistic behavior was considered due to Mr. Nelson having
5 stolen underwear for masturbation purposes. Tr.22, line 25.
6 Hebephilia, also referred to as prepubescent, was noted due to
7 the offense for his convictions. Tr.23. Dr. Krance further
8 found a narcissistic personality trait and noted that it did
9 not meet the full criteria for a narcissistic personality
10 disorder. Tr.24. She noted the narcissistic traits of
11 "elements of entitlement" and "a kind of superiority" in Mr.
12 Nelson. Id at line 17. Narcissism was further made evidence
13 due to Mr. Nelson's justification of the thefts of women's
14 underwear for masturbatory purposes, due to the fact that he
15 found his wife unattractive. Tr.25, lines 12-15. Dr. Krance
16 further took note of the narcissistic tendencies of Mr. Nelson
17 due to his defiance and attempts to minimize the thefts from
18 the various women's homes. Tr.25, lines 18-25.

19 ¶6 Dr. Krance found Mr. Nelson to have met the first prong
20 of the analysis, namely sexually predatory conduct due to his
21 four convictions of theft, and conviction for continuous
22 sexual abuse. Dr. Krance went on to the mental disorder, and
23 made that assessment conclusion as earlier specified. Then
24 Dr. Krance assessed whether Mr. Nelson is likely to engage in
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1 further acts of predatory conduct. App.35 and Tr.26. Dr.
2 Krance specifically noted Mr. Nelson's high score in the
3 Static-99R, which the standardized scales show a 37.3% chance
4 of recidivism within ten years. She also took note of Mr.
5 Nelson's relatively high degree of psychopathic traits, noting
6 Mr. Nelson's score of 86.6% on the PCL-R. App.38. Dr. Krance
7 did testify that the 86.6 percentile rank was not unusually
8 high but still concerning. Tr:27, lines 1-4. Dr. Krance took
9 particular note of the fact that Mr. Nelson's history shows
10 that when he has been on probation he has difficulty following
11 the rules of probation. Tr.27. He committed the acts of
12 stealing the ladies under garments while he was on supervised
13 probation for aggravated assault. Tr.27. Also found at
14 App.8. Dr. Krance further found that Mr. Nelson had violated
15 his electronic monitoring when he was out on bond during the
16 pendency of the continuous sexual abuse of a child. Tr.27,
17 lines 17-25.

18 ¶7 Dr. Krance did take note that Mr. Nelson completed sex
19 offender treatment while in prison. App.42. Dr. Krance took
20 note of the fact that completion of the sex offender treatment
21 meant that Mr. Nelson had "completed a three phase, long term
22 sex offender treatment program". Id. She did take note to
23 say that Mr. Nelson completing sex offender treatment does not
24 equate to Mr. Nelson being "cured", but only that "he has a
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solid knowledge base for future treatment focused on continuing to develop insight and improve his relapse prevention abilities". Id. Dr. Krance did note that although Mr. Nelson completed sex offender treatment, she found that it was apparent that he struggled with describing his sexual offense cycle and identifying a solid relapse plan. Id.

¶8 Dr. Krance also took note of Mr. Nelson's idiosyncrasies that he saw himself as very low or no risk to reoffend. In her professional opinion, this constituted a lack of insight and awareness of the risk one proposes as well as the factors that lead to reoffending. App.42. Based upon the foregoing review of Mr. Nelson's history, and interview, Dr. Krance found that Mr. Nelson has serious difficulty in controlling his behavior, and is like to engage in further acts of sexually predatory conduct. App.42.

¶9 Defense counsel called Dr. Robert Riedel to testify. Dr. Riedel scored the objective tests significantly differently from Dr. Krance. On redirect examination, Dr. Krance went through the itemized differences of opinion between herself and Dr. Riedel. On item number two of the PCL-R, Dr. Krance scored Mr. Nelson a two, where Dr. Riedel scored Mr. Nelson a one. Dr. Krance explained her difference of opinion in detail. Tr.50, lines 18-25.

¶10 Dr. Krance scored differently from Dr. Riedel on item

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number three of the PCL-R, and explained that difference.

Tr.51. On item four, Dr. Krance Mr. Nelson to have an issue with pathological lying, and scoring him a two, where Dr. Riedel scored this a zero, in which she did explain how Mr. Nelson had changed his story. Tr.51-52. Item six of the PCL-R, the doctors had a difference of opinion, which Dr. Krance explained her rational. Tr.52.

¶11 Item number seven also included a difference of opinion, regarding a "shallow effect". Tr.53. Dr. Krance noted that Mr. Nelson did not even know his children's birth dates. Id.

¶12 Dr. Krance noted a difference at item eight, pertaining to the callous lack of empathy. Tr.53. Dr. Krance took particular note that Mr. Nelson continues to believe the sexual abuse of the step-daughter was somewhat consensual. Tr.54. She took further note of derogatory statements made by Mr. Nelson about women while in treatment at the penitentiary. Id.

¶13 Dr. Krance and Dr. Riedel had a further difference of opinion at item nine of the PCL-R. Tr.54. Dr. Riedel scored this a zero as it pertains to a parasitic lifestyle. Dr. Krance scored the parasitic lifestyle a one, noting that while he was living with his first wife, he was unfaithful with who became his second wife. That he was unfaithful to his second wife due to the crime. She took particular note that there

1 was a significant period of time that he was not employed,
2 that his wife took care of things. Tr.54, lines 11-22. Dr.
3 Krance did note the difference at item ten, poor behavior
4 controls, noting that Dr. Riedel had actually scored this
5 higher than she did. So she did recognize that particular
6 issue. At item eleven, promiscuous sexual behavior, Dr.
7 Krance scored Mr. Nelson a one and Dr. Riedel scored Mr.
8 Nelson a zero. Dr. Krance noted Mr. Nelson's pornography
9 addiction, being unfaithful to his first wife, being
10 unfaithful to his second wife, and having several sexual
11 relationships at the same time, infidelities, and indiscreet
12 selection of sexual partners. Tr.55, lines 10-18.

15 ¶14 The two experts had a further difference of opinion at
16 item thirteen, lack of realistic long-term plans. Tr.55. Dr.
17 Krance scored Mr. Nelson a one, whereas Dr. Riedel scored him
18 a zero. Dr. Krance noted that Mr. Nelson's longest held job
19 throughout his entire life is three years. She also noted
20 that he quit school at the beginning of tenth grade and only
21 completed his GED at the James River Correctional Center.
22 Tr.55.

24 ¶16 Item fourteen, impulsivity, had a further difference of
25 opinion whereas Dr. Riedel scored Mr. Nelson a one and Dr.
26 Krance scored him a two. She took particular note of his
27 quitting jobs, and moving from place to place. Also noted was
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1 multiple DUI's. Tr.56. Item fifteen, irresponsibility,
2 showed another difference of opinion between the two experts.
3 Dr. Krance scored the irresponsibility a level two and Dr.
4 Riedel scored a level one. Tr.56. Dr. Krance explained her
5 reasoning.
6

7 ¶17 At the conclusion of the trial, Ramsey County District
8 Court gave counsel time to submit arguments. Tr.138.
9 Thereafter, the Court issued a written findings of fact,
10 conclusions of law, and order, dated March 8, 2016. The Court
11 took particular note of the offenses for which Mr. Nelson was
12 convicted at paragraph one, two, and three of the Order.
13 App.5. The Court did take note that Mr. Nelson completed sex
14 offender programming at the Department of Corrections. Id.
15 The Court did find that Mr. Nelson suffered from the mental
16 disorders of unspecified paraphilic disorder, substance abuse
17 disorder, other specified personality disorder (narcissistic
18 and antisocial personality traits). Id. The Court took note
19 of the differences of opinions of Dr. Krance and Dr. Riedel,
20 at paragraph six and seven of the decision. App.5. The Court
21 having considered both reports submitted by counsel and the
22 testimonies given, found that the testimony and the report of
23 Dr. Krance was more persuasive. App.6. The Court took
24 particular note that Dr. Riedel's opinion seemed to rely upon
25 the fact that Mr. Nelson had a reasonable release plan,
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however took note that over time the release plan could change and therefore the Court found it had little value in determining whether Mr. Nelson was at risk to reoffend. Tr.6.

LAW AND ARGUMENT

Issue 1. Did the trial court err in determining that Mr. Nelson is a sexually dangerous individual?

¶18 In order to commit a person as a sexually dangerous individual pursuant to N.D.C.C., Chapter 25-03.3, the State has the burden to prove by clear and convincing evidence that the Defendant has

[1] engaged in sexually predatory conduct,

[2] who has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder or dysfunction, and 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.

N.D.C.C., §25-03.3-01(8).

¶19 In applying this analysis, the first section, namely engaging in sexually predatory conduct, was met by Mr. Nelson due to his prior criminal offenses. This prong is met, and was also noted by the Defendant's own expert as being met. The second prong, that Mr. Nelson has a congenital or acquired condition that is manifested by a sexual disorder, personality

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disorder, or other mental disorder or dysfunction was met in the opinion of Dr. Krance due to her diagnosis of Mr. Nelson having the unspecified paraphilic disorder, substance abuse disorder, other specified personality disorder (narcissistic and antisocial personality traits). The Court particularly found this to have been met at paragraph five of it's order. App.5. paragraph 5.

¶20 Dr. Riedel held the opinion that the second prong of the test was not met, noting that he did not find any clinical or historical support for any of the diagnosis. App.67.

Considering the difference of opinion between the two experts, the Court considered both reports submitted by the State and the Respondent, and the testimony given, and found that the report of Dr. Krance was more persuasive. App.6, paragraph 10. The Court's finding of the credibility of Dr. Krance was further evident at paragraph five, wherein the Court found that Mr. Nelson had the mental disorders of unspecified paraphilic disorder, substance abuse disorder, other specified personality disorder, (narcissistic and antisocial personality traits). App.5, paragraph 5.

¶21 This Court has consistently held that the trial court is the best credibility evaluator in cases of conflicting testimony and will not second guess the trial courts credibility determinations. In the Matter of Wolff, 2011 N.D.

1 76 ¶ 5, 796 N.W.2d 644. Further, this Court has held that
2 when witnesses give conflicting testimony, the Court will not
3 decide to believe a witness different from the one believed by
4 the District Court. Hill vs. Weber, 1999 N.D. 74, ¶12, 592
5 N.W.2d 585.
6

7 ¶22 The third prong, which the State must show by clear and
8 convincing evidence, is that the mental disorder makes the
9 individual likely to engage in further acts of sexually
10 predatory conduct which constitutes a danger to the physical
11 or mental health or safety of others. N.D.C.C., §25-03.3-
12 01(8). Judge Foughty found that Dr. Krance concluded to a
13 reasonable degree of scientific certainty that Mr. Nelson was
14 likely to engage in further acts of sexually predatory
15 conduct. App.5, paragraph 6. The Court further noted that
16 Dr. Riedel had the opinion that there was an unbelievable
17 predication between the RAI's that he used, and the PCL-R is
18 very low showing no psychopathic tendencies. The trial court
19 further noted that Dr. Riedel's opinion was that Mr. Nelson
20 had a reasonable release plan at that time, and recommended
21 that the matter be dismissed and allow Mr. Nelson to go live
22 in Grand Forks with his ex-wife, which was the release plan.
23 Considering the difference of opinion, the Court again noted
24 that it found the report of Dr. Krance more persuasive.
25 App.6, paragraph 10. The Court did not agree with Dr.
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1 Riedel's opinion, since Mr. Nelson's release plan could change
2 and therefore had little value in determining whether Mr.
3 Nelson was at risk to reoffend. App.6, paragraph 11.
4

5 Issue 2. Does commitment as a Sexually Dangerous
6 Individual after completing sex offender treatment program in
7 prison constitute a violation of his substantive due process
8 rights?

9 ¶23 In addition to the three requirements contained in the
10 language of the statute, and this Court's definition of
11 "likely to engage in further acts of sexually predatory
12 conduct", the U.S. Supreme Court has held that in order to
13 satisfy the substantive due process requirements, the
14 individual must be shown to have serious difficulty
15 controlling his behavior. Kansas vs. Crane, 534 U.S. 407, 413
16 (2002). In the Matter of Hehn, 2008 N.D. 36, ¶19, 745 N.W.2d
17 631. Dr. Krance gave the opinion to the Court that Mr. Nelson
18 had a history of sexually related offenses dating back to at
19 least the early 1990's, being more than twenty years old.
20 App.42. Dr. Krance noted that Mr. Nelson was convicted of
21 four counts of theft of property for entering into the
22 residences of females to steal ladies undergarments for sexual
23 gratification. Id. He entered some of the residences on more
24 than one occasion. Id. Dr. Krance particularly noted that at
25 the time he entered those residences, he was already on
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1 supervised probation for a conviction of aggravated assault.
2 Dr. Krance further noted that Mr. Nelson was convicted of the
3 charge of continuous sexual abuse of a child in 2009. Id.
4 The doctor also took note of Danny Nelson's high score on the
5 Static-99R and PCL-R scores. App.43. These facts demonstrate
6 that Mr. Nelson has serious difficulty in controlling his
7 behavior, and Dr. Krance noted that this difficulty
8 differentiates him from the "dangerous but typical recidivist
9 convicted in an ordinary criminal case." App.43. The Court,
10 based upon the testimony of the experts, and noting that the
11 Court found Dr. Krance's opinion more persuasive, found that
12 the Respondent, Danny Nelson, constituted a sexually dangerous
13 individual as defined by N.D.C.C., §25-03.3-01(8).
14
15

16 **CONCLUSION**

17 ¶24 The Court found by clear and convincing evidence that
18 Danny Nelson was a sexually dangerous individual as required
19 under N.D.C.C., §25-03.3-01(8). The Court found the expert
20 testimony of Dr. Krance to be more persuasive than the expert
21 testimony presented on behalf of Mr. Nelson. The Court found
22 that Mr. Nelson was sexually dangerous individual based upon
23 the facts, and found that those findings were by clear and
24 convincing evidence. Therefore, the State requests that this
25 Court affirm the order of the district court.
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27 Respectfully submitted this _____ day of September, 2016.
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RAMSEY COUNTY STATES ATTORNEY
DEVILS LAKE, NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Lonnie W. Olson,)
Ramsey County State's Attorney,)
Appellee,)

Supreme Ct. No. 20160113

vs.)

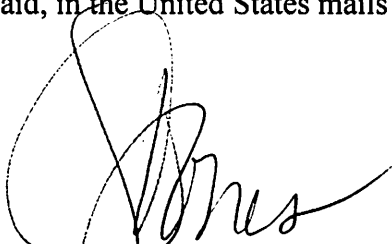
AFFIDAVIT OF SERVICE BY MAIL

Danny Robert Nelson,)
Appellant.)

Connie Jones, being first duly sworn, deposes and says that on the 27th day of
September, 2016, she served the attached copy of Brief of Appellee
regarding the above reference matter upon David Dusek
by placing a true and correct copy thereof in an envelope addressed as follows:

David D. Dusek
DUSEK LAW, P.C.
P.O. Box 14145
Grand Forks, ND 58208-4145

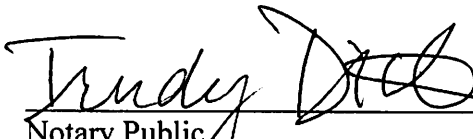
and depositing the same, with postage prepaid, in the United States mails in Devils Lake,
North Dakota.



Connie Jones

Subscribed and sworn to before me this 27th day of September, 2016.

TRUDY DICK
Notary Public
State of North Dakota
My Commission Expires Feb. 14, 2020
(SEAL)



Notary Public
Ramsey County, North Dakota