

**Supreme Court No. 20180083
District Court No. 09-07-R-237**

NORTH DAKOTA SUPREME COURT

In the Interest of Aaron Kulink

Leah J. Viste

(Petitioner and Appellee)

v.

Aaron Kulink

(Respondent and Appellant)

Appeal from the Findings of Fact, Conclusions of Law, and Order Denying Discharge
issued February 16, 2018, by the Honorable Susan L. Bailey of the Cass County District
Court, East Central Judicial District

BRIEF OF THE APPELLANT

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JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to N.D.C.C. § 25-03.3-19. The Cass County District Court issued a decision ordering Aaron Kulink (“Kulink”) remain civilly committed on February 16, 2018. Kulink timely filed this appeal on March 1, 2018.

ISSUE PRESENTED FOR REVIEW

I. [¶ 2] Whether the District Court's Order is sufficient pursuant to N.D.C.C. § 25-03.3 and prior cases before this Court

II. [¶ 3] Whether the District Court should be given another opportunity to issue an Order

II. [¶ 4] Whether Kulink remains a Sexually Dangerous Individual Pursuant to N.D.C.C. § 25-03.3 which would warrant further Civil Commitment.

STATEMENT OF THE CASE

[¶ 5] Kulink was initially committed to the North Dakota State Hospital (“NDSH”) as a Sexually Dangerous Individual on November 9, 2007. On September 2, 2016, Kulink waived his discharge hearing and was civilly committed with post-commitment community placement. Kulink has remained in the community since that time under civil commitment.

[¶ 6] Kulink exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. The Cass County District Court determined that the State had established by clear and convincing evidence that Kulink remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied Kulink’s discharge on February 16, 2018. Kulink appealed that decision on March 1, 2018.

STATEMENT OF THE FACTS

[¶ 7] Kulink petitioned for an annual review hearing pursuant to N.D.C.C. § 25-03.3-18 on whether he remained a sexually dangerous. A hearing was held on February 9, 2018. The State called Dr. Jennifer Krance (“Krance”) to testify that Kulink remained a sexually dangerous individual subject to continued civil commitment with post-commitment placement in the community. Kulink called Dr. Gregory Volk (“Volk”) who testified that Kulink no longer met the criteria for civil commitment.

[¶ 8] The Cass County District Court found that the State had proven by clear and convincing evidence that Kulink remained a sexually dangerous individual subject to continued civil commitment and issued a two-page Order in that regard on February 16, 2018. Kulink filed his appeal on March 1, 2018.

ARGUMENT

I. [¶ 9] The District Court's Order is insufficient pursuant to N.D.C.C. § 25-03.3 and prior cases before this Court

[¶ 10] This Court has determined that civil commitments of sexually dangerous individuals are reviewed under a “modified clearly erroneous” standard. *In re Midgett*, 2007 ND 198, ¶ 6, 742 N.W.2d 803, 805. The Court will affirm the trial court's decision unless the “order is induced by an erroneous view of the law, or [it is] firmly convinced the order is not supported by clear and convincing evidence.” *In re Anderson*, 2007 ND 50, ¶ 21, 730 N.W.2d 570.

[¶ 11] Under Chapter 25-03.3 of the North Dakota Century Code, the State has the burden of proving a person is a sexually dangerous individual by clear and convincing evidence. A person may not be committed as a "sexually dangerous individual" unless the State proves the following statutory elements provided in N.D.C.C. § 25-03.3-01(8):

(1) the individual has engaged in sexually predatory conduct, (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction, and (3) the individual's condition makes them likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.

[*Interest of Johnson*](#), 2016 ND 29, ¶ 3, 876 N.W.2d 25 (citations omitted). This Court has recognized substantive due process requires additional proof beyond the three statutory elements:

In addition to the three statutory requirements, to satisfy substantive due process, the State must also prove the committed individual has serious difficulty controlling his behavior. . . .

We construe the definition of a sexually dangerous individual to mean 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 from the dangerous but typical recidivist in the ordinary criminal case.

[*Wolff*](#), 2011 ND 76, ¶ 7, 796 N.W.2d 644 (citations omitted). The United States Supreme Court has explained civil commitment requires a connection between the disorder and the individual's inability to control his or her actions:

"[I]nability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder

subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Kansas v. Crane, 534 U.S. 407, 413 (2002). This Court has also recognized the conduct demonstrating an individual's serious difficulty in controlling behavior need not be sexual in nature. [Wolff](#), at ¶ 7.

[¶ 12] In *Hehn*, this Court 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. This Court further stated that such a determination was required to distinguish a sexually dangerous individual from the ordinary recidivist convicted in a typical criminal case. *Id.*

[¶ 13] In regards to Prong III, or the “likely” element of the statute, the district court’s two-page Order reads, “Dr. Krance testified that, although the Respondent has shown improvement, the Respondent still exhibits risk factors during this review period.” That is the extent of the district court’s Order in showing the State has provided clear and convincing evidence that Kulink remains a sexually dangerous individual and to distinguish Kulink from the ordinary recidivist.

[¶ 14] Looking to what is sometimes referred to as Prong IV, or the “*Crane*” or “volitional control” element created by prior cases, the district court’s two-page Order reads,

“...evidenced in particular by the incident in March of 2017, in which the Respondent was in possession of pornography and homemade sex toys.” That is the extent of the district court’s Order in showing the State has provided clear and convincing evidence that Kulink remains a sexually dangerous individual and to distinguish Kulink from the ordinary recidivist.

[¶ 15] Neither analysis passes scrutiny when reviewed in accordance with the *Interest of Johnson*, 2016 ND 29, 876 N.W.2d 25 or *Interest of Nelson*, 2017 ND 152, 896 N.W.2d 923.

II. [¶ 16] The District Court should not be given another opportunity to issue an Order

[¶ 17] In *Johnson* and *Nelson* this Court initially sent both cases back on remand for further findings. Now that both cases are out there for District Court Judges to review and understand, the opportunity for a “do over” should no longer exist. While awaiting the appeal process, these individuals are on “pseudo-commitment” pursuant to inadequate Orders. Specifically to this case, by the time a decision is reached, Kulink will have been civilly committed for at least seven months.

II. [¶ 18] Kulink does not remain a sexually dangerous individual Pursuant to N.D.C.C. § 25-03.3 which would warrant further Civil Commitment.

[¶ 19] To the extent this Court may review the matter *de novo* to determine the appropriate remedy, the Court need not look much past the district court's analysis under the *Crane* standard. Without conceding any other arguments, the Respondent would simply point out that in essence, the district court's decision in regards to this prong is that someone who has pornography and sex toys is unable to control his or her behaviors. In other words, masturbation and masturbatory materials in the privacy of one's home make someone a sexually dangerous individual.

CONCLUSION

[¶ 20] Under N.D.C.C. 25-03.3, at a petition for discharge hearing the State bears the burden of proving Aaron Kulink *remains* a sexually dangerous individual subject to civil commitment. This requires a present-day determination of sexual dangerousness. The “remains” standard requires that only present-day evaluations involving current medical determinations be used to support Kulink’s continued commitment.

[¶ 21] Based on the argument set forth as well as the evidence at hand, it is apparent that the State failed to meet its burden and the district court erred in determining that there was clear and convincing evidence that Kulink remains a sexually dangerous individual. Aaron Kulink respectfully requests this Court reverse the decision of the district court and grant Aaron’s immediate release.

Respectfully submitted this 10th day of July, 2018.

_____/s/_____
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IN THE SUPREME COURT
OF NORTH DAKOTA

State of North Dakota,)	
)	#09-07-R-237
Appellee,)	#20180083
)	
VS.)	CERTIFICATE OF SERVICE
)	
Aaron Kulink,)	
)	
)	
Appellant.)	


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

Appellant's Brief
Appellant's Appendix

Electronically through the Court Electronic Filing System to:

Leah Viste, Cass County State's Attorney, sa-defense-notice@casscountynd.gov

Dated: July 10th, 2018.


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NORTH DAKOTA SUPREME COURT

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CERTIFICATE OF SERVICE

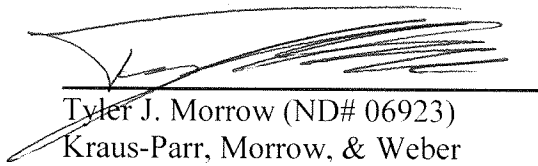
The undersigned, being of legal age, being first duly sworn deposes and says that he served a true and correct copy of the following document(s):

**Appellant's Brief-revised
Appellant's Appendix-revised**

Electronically through the Court Electronic Filing System to:

Leah Viste, Cass County State's Attorney, sa-defense-notices@casscountynd.gov

Dated: July 17, 2018.


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