

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

In the Interest of Robert R. Hoff,	)	Supreme Court No. 20190066
	)	Burleigh Co. No. 08-05-R-00363
-----	)	
	)	
Marina Spahr, Assistant State's Attorney,	)	
	)	
Petitioner and Appellee,	)	
	)	
v.	)	
	)	
Robert R. Hoff,	)	
	)	
Respondent and Appellant.	)	

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE FINDINGS OF FACT  
AND ORDER DENYING DISCHARGE  
ISSUED FEBRUARY 22, 2019**

**HONORABLE JOHN GRINSTEINER, PRESIDING  
SOUTH CENTRAL JUDICIAL DISTRICT**

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1. **STATEMENT OF ISSUES**

2. Did the lower court commit reversible error when it granted the State's Motion for Continuance of the January 29, 2019 Discharge Hearing?

3. Did the lower court commit reversible error when it determined that Hoff would have serious difficulty in controlling his behavior if released?

4. **STATEMENT OF THE CASE**

5. On October 9, 2018, Robert Hoff ("Hoff") filed an Application to Request Discharge Hearing with the Burleigh County District Court.

6. On January 29, 2019, a hearing was held on Hoff's Application for Discharge before the Honorable John W. Grinsteiner, District Judge. The hearing was continued as the State's evaluator had not filed his report of evaluation. A subsequent hearing was held on February 21, 2019.

7. On February 22, 2019, the District Court issued its Findings of Fact and Order Denying Discharge.

8. On February 27, 2019, Hoff filed his Notice of Appeal to the North Dakota Supreme Court.

9. The parties were notified of the discharge hearing on January 29, 2019. On January 28, 2019, the State filed a Request to Reset Hearing, as their evaluator, Dr. Richard Travis, had not filed a report of evaluation. This request was denied. (1/29/19 Tr. p. 2, ln. 20-23).

10. **STATEMENT OF FACTS**

11. On October 9, 2018, Robert Hoff (“Hoff”) filed an Application to Request Discharge Hearing with the Burleigh County District Court.

12. On January 29, 2019, a hearing was held on Hoff’s Application for Discharge before the Honorable John W. Grinsteiner, District Judge. The hearing was continued as the State’s evaluator had not filed his report of evaluation. A subsequent hearing was held on February 21, 2019.

13. On February 22, 2019, the District Court issued its Findings of Fact and Order Denying Discharge.

14. On February 27, 2019, Hoff filed his Notice of Appeal to the North Dakota Supreme Court.

15. **LAW AND ARGUMENT**

16. Did the lower court commit reversible error when it granted the State’s Motion for Continuance of the January 29, 2019 Discharge Hearing?

17. Robert Hoff was originally civilly committed as a sexually dangerous individual on January 12, 2006. On October 9, 2018, Hoff filed a Request for Discharge, pursuant to NDCC § 25-03.3-18.

18. The North Dakota Supreme Court reviews civil commitments of sexually dangerous individuals under a modified clearly erroneous standard of review. Interest of Nelson, 2017 ND 152, ¶3, 896 N.W.2d 923. We 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.” *Id.* When reviewing the district

court's order, this Court gives "great deference to the court's credibility determinations of expert witnesses and the weight to be given their testimony." In re Johnson, 2016 ND 29, ¶3, 876 N.W.2d 25.

19. At any hearing held pursuant to a petition for discharge, the burden of proof is on the State to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual. NDCC §25-03.3-18(4).
20. The standard of review of the lower court decision to continue civil commitment is:  
  
"We review civil commitments of sexually dangerous individuals under a modified clearly erroneous standard of review." Interest of G.L.D., 2011 ND 52, ¶5, 595 N.W.2d 346. "We will affirm a district court's order denying a petition for discharge unless it is induced by an erroneous view of the law or we are firmly convinced it is not supported by clear and convincing evidence." Id.
21. At a commitment proceeding, the State must prove by clear and convincing evidence that the person is a sexually dangerous individual. NDCC §25-03.3-13. When a committed individual petitions for discharge, the State must prove by clear and convincing evidence the individual remains a sexually dangerous individual. NDCC §25-03.3-18(4). The State must prove three statutory elements and establish an additional constitutional requirement to satisfy substantive due process requirements. In re Vantreece, 2009 ND 152, ¶5, 771 N.W.2d 585; Kansas v. Crane, 534 U.S. 407 (2002).
22. The three statutory elements under North Dakota law are: an individual (1) who is shown to have engaged in sexually predatory conduct and (2) who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder,

or other mental disorder or dysfunction (3) 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. NDCC § 25-03.3-01(8).

23. To comport with the language of the statute and constitution substantive due process concerns, this Court:

“construe(s) 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.”

24. Matter of G.R.H., 2006 ND 56, ¶18, 711 N.W.2d 587. The fourth step is a constitutionally required inquiry whether the individual has difficulty controlling his behavior. In re E.W.F., 2008 ND 130, ¶10, 751 N.W.2d 686.
25. The first, or initial prong or element, the presence of sexually predatory conduct, was found by both evaluators and found by the Court.
26. The second prong, on whether Hoff had a sexual disorder, personality disorder or other mental order or dysfunction, was found by Dr. Travis (2/21/19 Tr. p. 14, ln. 1-6).
27. The nexus between the disorder and the likelihood that Hoff will engage in further sexually predatory conduct is where the spotlight must be focused.
28. In the Matter of G.R.H., 2006 ND 56, 711 N.W.2d 587, our Court upheld the commitment of a person diagnosed with antisocial personality disorder as a sexually dangerous individual, 2006 ND 56. Recognizing, as the United States Supreme

Court did in Kansas v. Crane, that constitutional considerations require proof that the individual's disorder or dysfunction in some way causes that individual serious difficulty in controlling his or her behavior, our Court stated:

[W]e 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. We conclude the nexus between the requisite disorder and future dangerousness satisfies the due process requirements of Crane.

29. In addition to the three statutory elements, the State must satisfy substantive due process and prove the committed individual has serious difficulty controlling his behavior. In re Whitetail, 2013 ND 143, ¶5, 835 N.W.2d 827. In Kansas v. Crane, the Supreme Court explained that “we did not give to the phrase ‘lack of control’ a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, ‘inability to control behavior’ will not be demonstrable with mathematical precision.” 534 U.S. 407, 413 (2002). Although not mathematical, the “inability to control behavior... 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.” *Id.* Thus, a “connection between the disorder and the individual’s inability to control” his actions must be found. Nelson, 2017 ND 152, ¶4, 896 N.W.2d 923.



30. North Dakota incorporates the Crane requirement through the definition of sexually dangerous individual, which requires “proof of a nexus between the requisite disorder and dangerousness [to] encompass[] proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual offender whose disorder subjects him to a civil commitment from the dangerous but typical recidivist in the ordinary criminal case.” In re J.M., 2006 ND 96, ¶10, 713 N.W.2d 518. The three statutory elements and the Crane element must be proven by the State with clear and convincing evidence. Nelson, 2017 ND 152, ¶5, 896 N.W.2d 923.
31. 2006 ND 56, ¶ 18; see also Kansas v. Crane, 534 U.S. 407 (2002). A diagnosis of antisocial personality disorder does not, per se, establish a nexus between the requisite disorder and future dangerousness. The evidence must clearly show the antisocial personality disorder is likely to manifest itself in a serious difficulty in controlling sexually predatory behavior.
32. Thus, the inquiry in this appeal is whether the State produced clear and convincing evidence that the antisocial personality disorder is likely to manifest itself as a serious difficulty in controlling sexually predatory behavior. Not that Hoff’s antisocial personality disorder would likely result in “dangerous but typical” recidivism but acts of sexually predatory behavior.
33. In Interest of J.M., 2006 ND 96, 713 N.W.2d 518, J.M. was diagnosed with severe antisocial personality disorder. Hoff was diagnosed with the same disorder, but with what can likely be described as a “garden variety” disorder.

34. Even in spite of these conclusions, the State never really produced any evidence, much less clear and convincing, that the antisocial personality disorder was likely to manifest Hoff in a serious difficulty in controlling sexually predatory behavior. Since he has no diagnosed sexual disorder, there is seemingly little risk of sexual reoffending. Since review hearings are required to determine risk in a forward looking manner, the Court neglected to consider that Hoff has not engaged in any sexual offending behavior while committed.
35. The Stated attempted to demonstrate that Hoff's antisocial personality disorder would manifest itself as sexual deviant behavior. However, the State failed to connect the disorder to a risk of reoffending or reengaging in sexually predatory behavior.

**[intentionally left blank]**

36. Did the lower court commit reversible error when it determined that Hoff would have serious difficulty in controlling his behavior if released?
37. The State attempted to explain the lack of filing of an evaluation report by Dr. Travis:
38. MS. SPAHR: Well, Your Honor, I'd still ask for a continuance, and the reason for that is I don't have an evaluation. There isn't one complete, as well as the doctor who is assigned to it, he's originally from Florida, but he's in Illinois at another hearing. About two weeks ago, on January 17<sup>th</sup>, I was looking at my upcoming cases and Gwen Tardiff from our office is the assistant who handlese these. I went to her and said, well, I've got trial all next week and I don't think I've seen an evaluation, can you check. So she sent an email to the State and they said that the independent evaluator had been there and that our evaluation would be coming. We didn't receive anything so we checked yesterday again and what they told us was that there was a miscommunication between their assistant and the doctor and that he hadn't done an evaluation yet and that he actually wasn't even able to appear, because I asked that, too. I said, well, can I get him here to talk about that? She said, no, he'll be in Illinois.
39. And they did get notice of it. They're included in the emails, the scheduling emails, and we never actually subpoena the State Hospital, it's just through the emails, but they were included in those October scheduling emails. And, Your Honor, I apologize. I don't know what more there was that we could have checked on or asked about. And, like I say, I don't even have an evaluation. And this is a review. It's my understanding that that 60-day timeline does not apply to reviews.

40. THE COURT: Do we have Dr. Mugge here?
41. MR. MORROW: No.
42. THE COURT: Was that doctor subpoenaed to testify?
43. MR. MORROW: No, she was not.
44. MS. SPAHR: Your Honor, they don't have to call her to testify. I think last time she did testify, but they're not required to call their evaluator.
45. THE COURT: Well, we don't even have anybody here to provide testimony, then, is what you're telling me?
46. MS. SPAHR: I don't. Like I say, I don't know how I could have gotten them here, sir. (1/29/19 Tr. p. 3, ln. 1-25; p. 4, ln. 1-13)
47. The trial court came to the concession that the State Hospital was responsible for the failure of Dr. Travis to file his evaluation report:
48. THE COURT: Well, this isn't the first SDI hearing that the State Hospital has ever needed to have done. It's just confusing that they would - - it seems like they mayabe have dropped the ball on that end and failed to do that, knowing that this was upcoming with another request made by Mr. Hoff, the appointment of an independent evaluator, that person showing up at the facility, doing an evaluation, filing a report. I don't know how we missed the ball that we should evaluate Mr. Hoff and have a report ready. It doesn't look like it's necessarily in the actions of the State's Attorney Office. (1/29/19 Tr. p. 4, ln. 14-24).
49. Counsel for Mr. Hoff moved the Court for an order finding that the request to continue hearing failed a showing of good cause. He also argued that the State failed

to present any evidence to establish that Hoff remained a sexually dangerous individual. (1/29/19 Tr. p. 5, ln. 2-16).

50. Hoff explained that Dr. Travis had visited with him at the State Hospital in September 2018. (1/29/19 Tr. p. 5, ln. 18-25; p. 6, ln. 1-5), and obtained information upon which to make an evaluation.

51. The State offered the following additional explanation for the timeline of the State Hospital to obtain and file a report:

52. MS. SPAHR: I do. What I know from speaking with Katie at the State Hospital is that there is no evaluation that's completed, so there's nothing on paper. If Dr. Travis came to see Dr. Hoff in September, that would have been before the review was requested. I pushed Katie to see what the problem was and they just kept telling me that there was a break in communication between her and the doctor. Katie is relatively new. We used to deal with Robin and that changed about that time. So I don't know what it is, but I know that there's case law in regard to that preliminary hearing where you're supposed to have the final hearing within 60 days and there's that requirement after the preliminary hearing, not at this state, but at the preliminary hearing. There is case law that states that it is good cause if the evaluation isn't completed. And that's what I have here, sir. (1/29/19 Tr. p. 6, ln. 16-25; p. 7, ln. 1-6).

53. The Court decided to grant the request for continuance, after the following rationale:

54. THE COURT: Well, what I'm - - the reason why I denied it yesterday, to be honest with you, is I had assumed that Dr. Mugge would be here to testify. Now, obviously,

that's an incorrect assumption. So I thought, obviously, we've had one evaluation and we've got a doctor and they'll be here and testify and that should be enough for the Court to make its findings, but we don't even have that doctor here to provide testimony. We've got a report, but that doesn't allow any cross-examination or questioning on that report. So, obviously, without that doctor here and then no eval done by the State, it's obviously good cause to continue the hearing. (1/29/19 Tr. p. 7, ln. 7-17).

55. The end result was that the Court determined good cause existed to grant the request for continuance, solely because the independent evaluator, Dr. Jessica Mugge, had completed and filed her evaluation report (but was unavailable to cross-examine on her conclusions and opinions). The Court also found good cause in the fact that the State had provided no expert evaluation report.

56. Section 29-19-06 N.D.C.C. provides the guideposts for determining the merits of an application for continuance on the ground of an absent witness:

57. **29-19-06. Application for continuance on ground of absent witness.**

An application for a continuance on the ground that a witness is absent must show:

- (1) That the applicant has used due diligence to prepare for the trial;
- (2) The nature of the diligence used;
- (3) The name and residence of the absent witness;
- (4) What the applicant expects or believes such witness would testify were that witness present and orally examined in court.
- (5) That the testimony of the witness is material;
- (6) The nature of any document wanted and where the same may be found;

- (7) That the same facts cannot be satisfactorily shown by other evidence; and
- (8) That the witness is not absent through the connivance or counsel of the applicant.

58. The State based their continuance request on the absence of their expert witness, Dr. Travis. Therefore, the trial judge should have (“must show”) analyzed these eight factors before granting the continuance. His failure to do constitutes good reason to reverse the Court’s order granting a continuance to the State. The Court’s failure to do a proper analysis was an abuse of discretion. This matter should be reversed and remanded. See also Rule 6.1(b) N.D.R.Ct. and Caroll v. Caroll. 2017 ND 73, 892 N.W.2d 173 (good cause was not shown for a continuance when filed only the day before trial and the movant had been well notified ahead of time of the trial date.)

59. **CONCLUSION**

60. The State based their continuance request on the absence of their expert witness, Dr. Travis. Therefore, the trial judge should have (“must show”) analyzed these eight factors before granting the continuance. His failure to do constitutes good reason to reverse the Court’s order granting a continuance to the State. The Court’s failure to do a proper analysis was an abuse of discretion. This matter should be reversed and remanded. See also Rule 6.1(b) N.D.R.Ct. and Caroll v. Caroll. 2017 ND 73, 892 N.W.2d 173 (good cause was not shown for a continuance when filed only the day before trial and the movant had been well notified ahead of time of the trial date.)

Dated this 14<sup>th</sup> day of May, 2019.

/s/ Kent M. Morrow

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Robert R. Hoff, )  
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Respondent and Appellant. )

Supreme Court No. 20190066  
Burleigh Co. No. 08-05-R-00363

**CERTIFICATE OF SERVICE**

1. I hereby certify that on the 14<sup>th</sup> day of May, 2019, a copy of the foregoing Appellant’s Brief and Appendix were served by electronic mail upon:

North Dakota Supreme Court Clerk  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

Marina Spahr  
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and upon the Respondent Robert Hoff at the following address:

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