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Recent Opinions

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RECENT OPINIONS

Question:

What is the correct procedure for having an alcoholic committed for treatment and also whether or not an alcoholic can be committed to a facility other than the State Hospital such as the Heartview Foundation in Mandan and

1. What is the proper procedure for initiating a commitment?
2. Who is eligible to initiate a commitment?
3. Is the county judge obligated to call a hearing of the Mental Health Board if someone wishes to initiate a commitment? (There have been a number of incidences where a wife has gone to the county judge requesting to have her husband committed and the judge has refused to let her sign a complaint.)
4. Does a person being committed have any legal recourse such as suing the person or persons initiating a commitment?
5. Can the Mental Health Board make a commitment to a facility other than a state institution?

Prior to 1969 there was no special provision providing for commitment of alcoholics to the State Hospital or other institution although in a previous opinion, it was held that a county mental health board could proceed under the provisions for the involuntary hospitalization for an individual whose mental health was found to be substantially impaired by the disease of alcoholism or drug addiction. In 1969 the Legislature amended certain provisions of chapter 25-03 of the North Dakota Century Code to specifically include within the involuntary hospitalization procedures an alcoholic or a drug addict as well as those persons who were mentally ill. In answer to the questions presented:

1. The statutes specify the proper procedure for initiating a commitment. This procedure, specified by section 25-03-11, provides for the filing of a written application with the mental health board. Such application, unless waived by the county judge, must be ac-

companied by a certificate of a licensed physician stating that he has examined the individual and is of the opinion he is mentally ill, an alcoholic or a drug addict and should be hospitalized, or a written statement by the applicant that the individual has refused to submit to or is unable to consent to an examination by a licensed physician.

There is also a provision for emergency commitment procedure in instances involving an individual who is mentally ill, an alcoholic or a drug addict and, because of his illness, is likely to injure himself or others if allowed to remain at liberty pending an examination. In such case, a health or police officer or a licensed physician may obtain the written or verbal consent of the county judge, or in his absence any member of the county mental health board, to apply to a hospital for his emergency admission. If neither the county judge nor a member of the county mental health board is available to give consent, a licensed physician, who has reason to believe that an individual is mentally ill, an alcoholic or a drug addict and because of his illness is likely to injure himself or others if allowed to remain at liberty pending an examination by written order, may direct an emergency admission to the State Hospital or to a private hospital. The head of the private hospital or the Superintendent of the State Hospital, as the case may be, must require an immediate examination of such person to be made; and if he determines that hospitalization is not warranted, he must immediately discharge the person. See section 25-03-08 of the North Dakota Centurey Code.

2. Section 25-03-11 provides that regular proceedings for the involuntary hospitalization of an individual may be commenced by a friend, relative, spouse, or guardian of the individual, or by a licensed physician, police officer, state's attorney, a health or public welfare officer, or the head of any public or private institution in which the individual may be.

3. Section 25-03-11 provides that as soon as practicable after notice of the commencement of proceedings is given or after determination that notice should be omitted, the mental health board is to appoint at least one licensed physician to examine the proposed patient and report to the board his findings as to the condition of the proposed patient and the need for his custody, care, or treatment in a mental hospital. If the report of the examiner shows the proposed patient is not mentally ill, an alcoholic or a drug addict, the mental health board, without taking any further action, may terminate the proceedings and dismiss the application; otherwise, the board must fix a date for a hearing before the board and give notice to, the person designated. These provisions appear to be manda-

tory, at least with respect to the acceptance of an application; and we find no authority for the county judge to refuse an application.

4. Section 25-03-28 of the North Dakota Century Code provides:

> 25-03-28. UNWARRANTED HOSPITALIZATION OR DENIAL OF RIGHTS—PENALTIES.—Any person who willfully and maliciously causes or conspires with or assists another to cause the unwarranted hospitalization of any individual under the provisions of this chapter, or the denial to any individual of any of the rights accorded to him under the provisions of this chapter, shall be punished by a fine of not exceeding one thousand dollars or by imprisonment of not more than one year, or by both such fine and imprisonment.

The Supreme Court of North Dakota has also held that a civil action will lie for malicious prosecution and without probable cause of a proceeding, the object of which is to have a person committed to the State Hospital. See *Johnson v. Huhner*, 33 N.W.2d 268 (1948). Therefore, it is possible for a person being committed to sign a criminal complaint or bring a legal action against the person or persons initiating a commitment. Whether such suits would be successful would, of course, depend upon the facts involved.

5. Under the emergency commitment procedure the person may be hospitalized in the State Hospital or a private hospital. Under the regular commitment procedure; i.e., application, hearing before the county mental health board, etc., the county mental health board has the authority to order hospitalization at the State Hospital or other suitable place. Presumably an institution such as Heartview would be a suitable place for a person deemed in need of treatment as an alcoholic because he is likely to injure others or himself if allowed to remain at large. However, whether Heartview would qualify as a "hospital" under the emergency commitment procedure involves facts not within the scope of the opinion.

These statutes make no provision for costs of care at private institutions or hospitals. Therefore, a private institution or hospital could refuse to accept a person committed thereto unless arrangements for the payments of cost of treatment had been made. In this regard, the county mental health board has no authority to make any payments to private institutions or to order any payment to private institutions. Therefore, the county mental health board would not commit a person to a private institution unless there were some arrangement made for the payment of costs of treatment there.

As a general observation, it appears the Legislature, in providing for commitment of alcoholics and drug addicts, made no particular provisions for their care at institutions other than the State Hospital; and while it appears the county mental health board may commit

an alcoholic or drug addict to an institution such as Heartview, there is no special provision relating thereto.

Question:

In regard to the administration of the Implied Consent Law as set forth in Chapter 39-20 of the North Dakota Century Code as amended to date.

The issue has been raised that an arrest made at night for an offense not committed in the officer's presence was not a valid arrest under the provisions of Section 29-06-08. An opinion of the Attorney General's office of March 11, 1970, stated that an arrest for driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages could be made without a warrant whether at night or any other time.

An opinion rendered in the Fifth District Court states:

> Until the legislature does narrow the restrictions of Section 29-06-16, officers of the law may not arrest persons at nighttime without a warrant for misdemeanors unless such misdemeanors are committed or attempted in the presence of the officer. That is the present state of the law in North Dakota.

In the circumstances set forth in the opinion, the clear implication is that there is no exception to this principal, for the offense commonly denominated D.W.I.

The opinion of the Attorney General is that this district court opinion is binding upon an administrative hearing officer in those cases where the factual situations are similar to those appearing in the case of the City of Minot v. Raymond O. Knudson, i.e., where a court has in effect declared the arrest invalid, or made other determinations which must necessarily imply invalidity of the arrest. *See, e.g.*, the decisions in Colling v. Hjelle, 125 N.W.2d 453, (1964); McDonald v. Ferguson, 129 N.W.2d 348, (1964). It does not necessarily follow that the mere fact that the arrest was made at night for a D.W.I. offense, not committed in the officer's presence, would justify the highway commissioner in failing to revoke the driver's license.

While the effect of a court decision invalidating an arrest may well be to make any action undertaken thereunder a nullity, the Attorney General does not believe the highway commissioner under Chapter 39-20 is given jurisdiction to make the initial determination as to the invalidity of the arrest. It is entirely conceivable in an

instance where the arrest was made at night for a D.W.I. offense, not committed in the officer's presence, that the defendant will plead guilty and be convicted of the offense charged.

Where the person has in fact been arrested, even though there may be valid legal questions as to the ultimate validity of the arrest and such arrest may later be judicially declared to be invalid, it is nevertheless an arrest within the meaning of the Implied Consent Law. At such time as the arrest has been judicially declared to be invalid and the Highway Commissioner has been so informed, the order of the Highway Commissioner should be modified accordingly.

The statutory provision does appear to require the highway commissioner's action to be taken, without necessarily waiting for a judicial determination of the validity of the arrest. Thus, Section 39-20-04 of the 1969 Supplement is applicable. On such basis it would seem doubtful that the highway commissioner could continue hearings on the basis of evidence that might later cause a court to determine the arrest to be invalid, until such time as the court determined the arrest to be valid or invalid.

It was therefore concluded that upon receipt of the sworn report referred to in Section 39-20-04 of the 1969 Supplement to the North Dakota Century Code showing that such officer has made an arrest to the point where the alleged offender charged has been detained to be brought before a court for judicial determination, that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor, and that the person had refused to submit to the test or tests, the highway commissioner is required to take the action specified in said Section 39-20-04. It was further concluded that the issue of "whether the person was placed under arrest" as specified in Section 39-20-05 of the 1969 Supplement to the North Dakota Century Code at the administrative hearing held on his request must necessarily relate to whether or not there has been an arrest to the point where the offender charged has been detained to be brought before a court for judicial determination, not as to whether the arrest will be subsequently judicially determined to be valid or invalid. At such time as "new evidence" showing that the arrest has been judicially determined to be invalid is presented, the order of the highway commissioner should properly be modified in accordance with same.

Question:

Whether the words "during time of war" found in Section 20-03-05 of the North Dakota Century Code which relates to the issuing

of resident hunting licenses to servicemen allows resident servicemen on leave in the state to hunt and fish here without a license.

Section 20-03-05 of the North Dakota Century Code states:

> RESIDENT LICENSES MAY BE ISSUED AT DISCRETION OF THE COMMISSIONER.—Any resident license prescribed by this title may be issued by and in the discretion of the commissioner to a person who has come to this state with a bona fide intention to become a resident thereof, even though he has not been a resident of this state for the required period of time immediately preceding the application for the license or to any person who is a member of the armed forces of the United States, and who is within the state on furlough, or leave, or on temporary duty, or to any person who is in the employ of the United States fish and wildlife service or the conservation department of any state or province of Canada, and who is in the state for the purpose of advising or consulting with the North Dakota game and fish department. Any resident of the state, while in the military service of the United States, shall be permitted to hunt game birds or fish without a license therefore during the open season during the time of war. No license shall be issued under the provisions of this section unless a satisfactory affidavit of some bona fide resident setting forth the actual conditions accompanies the application.

This contemplates two situations insofar as military personnel are concerned. The statute authorizes, but does not require, the Game and Fish Commissioner to grant a resident license to any person who is a member of the armed forces of the United States, and who is within the State on furlough, or leave, or on temporary duty. The statute also requires that any resident of the State, while in the military service of the United States, be permitted to hunt game birds or fish without a license therefore during the open season during time of war.

The first situation does not prescribe that it must be in "time of war." The Commissioner may issue the license, in his discretion, to any serviceman on leave, on furlough or on temporary duty in this State regardless of whether he is a resident and regardless of whether it is in "time of war."

There is no reason for distinguishing between the Korean Conflict and the Vietnam Era insofar as this matter is concerned. The Attorney General's office, in an opinion dated December 20, 1951, to Mr. Floyd E. Henderson, Executive Secretary, Veterans' Aid Commission, held a person who had served for a period of not less than thirty days in the armed forces of the United States during the Korean Conflict was entitled to a loan under the provisions of chapter 37-14 of the North Dakota Revised Code of 1943, as

amended. The statute (section 37-1406) made veterans eligible for a loan if they had served for a period of not less than thirty days "while the United States was at war."

However, the Game and Fish Commissioner is required to issue no license to the serviceman. The statute merely provides they may hunt game birds and fish during open seasons in time of war without a license if they are residents of this State and in military service. If they are accused of hunting without a license the Court would determine whether they were exempt from a license under the provisions of section 20-03-05. In this respect our opinion is not binding upon the Courts and it is the Courts rather than the Game and Fish Commissioner who would ultimately determine the question.

Question:

What are the legal problems involved in registering a motorcycle that has been modified by extending the front wheel and front end assembly.

The applicable statutes would appear to be Sections 39-21-45.1 and Subsection 1 of Section 39-02-06 of the 1969 Supplement to the North Dakota Century Code. These statutes provide:

> 39-21-45.1. MODIFICATION OF MOTOR VEHICLES.—It shall be unlawful for any person to operate a motor vehicle of a type required to be registered under the laws of this state with an unloaded weight of six thousand pounds or less upon a public highway with either the rear or front end suspension system or steering mechanism altered or changed from the manufacturer's original design, except that nothing contained herein shall prevent the installation of manufactured heavy duty equipment to include shock absorber and overload springs, nor shall anything contained herein prevent a person from operating a motor vehicle on a public highway with normal wear of the afore-mentioned systems and mechanism and provided further that the normal wear shall not affect the control of the vehicle through the steering mechanism.
> 39-04-06. WHEN REGISTRATION RESCINDED.—The department shall rescind and cancel the registration of a motor vehicle:
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> 1. When the department shall determine that a vehicle is unsafe or unfit to be operated or is not equipped as required by law;

The first statute quoted, in express terms forbids operation of a motor vehicle with front suspension system altered or changed from the manufacturer's original design, with further limitations with regard to registration requirements, unloaded weight, place of operation, etc. As to the second statute quoted, the department could properly determine that the vehicle is not equipped as required

by law upon completion of a proposed alteration project, and at such point could rescind registration. There is a prohibition of operation of such vehicles on the highway contained in the quoted Section 39-21-45.1. The term highway as used in this context would necessarily include city streets.

Considering said Section 39-21-45.1 as a whole, it is obvious that the legislative assembly was not intending to prohibit artistic endeavor, but rather was looking to the safety advantages of requiring vehicles to have the knowledge of manufacturer's engineering staff, federal regulation of such manufacturer's production, financial liability of such manufacturer, etc., regulating design, as opposed to the facilities available to the average "do-it-yourselfer." The altered machine would necessarily as completed have to be identical with machines available from the manufacturer e.g., center of gravity, strength of frames, braces, and all parts, etc., to justify the department in not rescinding registration of same, the burden of proving such altered machine to be identical to machines available from the manufacturer would be upon the person applying for registration of same.