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Nebraska Supreme Court
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D.I., appellant and cross-appellee,
v. William R. Gibson and
TyLynne Bauer, appellees
and cross-appellants.
867 N.W.2d 284

Filed August 7, 2015. No. S-14-980.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes: Words and Phrases.** The general rule is that the word "shall" in a statute is mandatory and inconsistent with the idea of discretion.
4. **Statutes: Intent: Words and Phrases.** A court will construe the word "shall" as permissive if the spirit and purpose of the legislation requires such a construction.
5. **Mental Health: Time.** The 7-day time limit for holding a hearing under Neb. Rev. Stat. § 71-1207 (Reissue 2009) is directory, not mandatory.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Ryan J. Stover, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, David A. Lopez, and James D. Smith for appellees.

Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Connolly, J.

SUMMARY

D.I. was taken into custody under the Sex Offender Commitment Act (SOCA)[1] on November 16, 2006. Under § 71-1207, the mental health board "shall" hold a hearing within 7 days after the subject is taken into emergency protective custody. The board did not hold a hearing until December 21. D.I. petitioned for a writ of habeas corpus, claiming that the mental health board did not have jurisdiction because the hearing was untimely. The district court dismissed D.I.'s petition. Because the 7-day time limit in § 71-1207 is directory, not mandatory, we affirm.

BACKGROUND

In 2003, a jury convicted D.I. of sexual assault on a child. The court sentenced D.I. to 5 years' imprisonment.

Shortly before D.I. finished his sentence, the Douglas County Attorney filed a petition with the Mental Health Board of the Fourth Judicial District (Board) alleging that D.I. was a dangerous sex offender under the SOCA. The Board issued a warrant directing the Department of Correctional Services to hold D.I. in custody until the commitment hearing. Under the warrant, D.I. remained at the Omaha Correctional Center after serving the last day of his sentence on November 16, 2006.

On December 21, 2006, the Board held a commitment hearing and determined that D.I. was a dangerous sex offender. The Board placed D.I. in the Department of Health and Human Services' custody for inpatient treatment.

In May 2013, D.I. petitioned for a writ of habeas corpus in the Madison County District Court. He named two employees of the Norfolk Regional Center as the respondents. As

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

relevant here, the petition alleged that the Board's failure to hold a hearing within 7 days violated the SOCA and D.I.'s due process rights.

After the parties filed a joint stipulation of facts, the court dismissed D.I.'s habeas petition. The court concluded that the 7-day period in § 71-1207 was directory, rather than a mandatory condition to D.I.'s lawful commitment.

ASSIGNMENTS OF ERROR

D.I. assigns that the court erred by dismissing his petition for a writ of habeas corpus.

On cross-appeal, the respondents assign that the court erred by not dismissing the petition on the ground that D.I. had an adequate remedy under the SOCA.

STANDARD OF REVIEW

[1] On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[2]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

Appeal

D.I. argues that the Board's failure to hold a hearing within 7 days is a "jurisdictional defect" that makes the December 2006 commitment order void.[4] Under the SOCA, anyone who believes that another person is a dangerous sex offender can alert the county attorney of that belief.[5] If the county attorney agrees, he or she files a petition in district court and may request emergency protective custody.[6] The clerk of the

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[2] *Johnson v. Gage*, 290 Neb. 136, 858 N.W.2d 837 (2015).

[3] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[4] Brief for appellant at 5.

[5] § 71-1205.

[6] §§ 71-1205 and 71-1206(2).

district court prepares a summons which, under § 71-1207, "shall fix a time for the hearing within seven calendar days after the subject has been taken into emergency protective custody." At the hearing before the mental health board, the State has the burden to prove by clear and convincing evidence that the subject is a dangerous sex offender and that less restrictive treatment is not appropriate.[7]

The respondents do not dispute that the hearing was untimely. But they contend that the 7-day time limit in § 71-1207 is merely directory and that therefore, the Board's failure to hold a timely hearing did not deprive it of jurisdiction. D.I. argues that the word "shall" in § 71-1207 shows that the time limit is mandatory.

[3,4] The general rule is that the word "shall" in a statute is mandatory and inconsistent with the idea of discretion.[8] But we construe the word "shall" as permissive if the spirit and purpose of the legislation requires such a construction.[9] No universal test distinguishes mandatory from directory provisions.[10] Broadly, provisions that relate to the essence of the thing to be done are mandatory while provisions for which compliance is a matter of convenience rather than substance are directory.[11] Put another way, we have been reluctant to deem provisions mandatory if something less than strict compliance would not interfere with the statute's fundamental purpose.[12]

We have frequently applied these principles to statutory time limits. In most cases, we have decided that provisions

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[7] §§ 71-1208 and 71-1209.

[8] E.g., *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). See Neb. Rev. Stat. § 49-802 (Reissue 2010).

[9] E.g., *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

[10] E.g., *id.*

[11] See *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987).

[12] See *Troshynski v. Nebraska State Bd. of Pub. Accountancy, supra* note 9.

specifying the time by which something "shall" be done are merely directory.[13] But we have given "shall" a mandatory construction if completion of the action within the specified period was essential to accomplishing a principal purpose of the law.[14]

We have not yet addressed whether the 7-day time limit in § 71-1207 is mandatory or directory. But the respondents argue that the Nebraska Court of Appeals' interpretation of a similar section of the Nebraska Mental Health Commitment Act (MHCA)[15] is persuasive. In *In re Interest of E.M.*,[16] the mental health board held a hearing and committed E.M. to inpatient treatment 8 days after law enforcement took him into custody. A section of the MHCA provided that "'[n]o person may be held in custody pending the hearing for a period exceeding seven days . . . .'"[17] E.M. argued that the board should have dismissed the proceeding because the hearing was untimely.

Despite reasoning that "the phrase 'no person may be held in custody' is comparable in meaning and effect to saying that the State 'shall not hold a person in custody,'" the Court of

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[13] See, *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990); *State v. Steele, supra* note 11; *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977); *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976). See, also, *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013); *Hendrix v. Sivick*, 19 Neb. App. 140, 803 N.W.2d 525 (2011); *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007); *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006); *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001).

[14] *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

[15] Neb. Rev. Stat. §§ 71-901 to 71-963 (Reissue 2009 & Cum. Supp. 2014).

[16] *In re Interest of E.M.*, 13 Neb. App. 287, 691 N.W.2d 550 (2005).

[17] *Id.* at 293, 691 N.W.2d at 556, quoting Neb. Rev. Stat. § 83-1045.02 (Reissue 1999) (now found at § 71-932).

Appeals concluded that the prohibition was directory.[18] The court stated that the main objective of the statute was to ensure the effectiveness and viability of outpatient treatment for a mentally ill dangerous person. The 7-day period was not essential to this objective because it was only designed to ensure order and promptness.

The court was also persuaded by the difficulty of remedying tardiness:

> [I]t is apparent that the time specification in this case should be considered directory and not mandatory precisely because there is no effective sanction for noncompliance. Were we to accept E.M.'s position that the proceedings should have been dismissed, there is nothing whatsoever which would have prevented the board from dismissing the proceeding and, at the same time, issuing a new warrant and ordering that E.M. be taken back into custody immediately.[19]

And, the court noted, E.M. did not explain how the 1-day delay prejudiced him.

D.I. relies on two other cases to show that he is entitled to relief. First, he cites *Davis v. Settle*,[20] which involved a section of the MHCA that, similar to § 71-1207, said that the summons "'shall fix a time for the hearing within seven days after the subject has been taken into protective custody.'"[21] The mental health board took custody of the petitioner on September 13, 2001, but did not hold a hearing until September 25. On appeal, we concluded that the petitioner's claim for habeas relief was moot because the respondents no longer had custody of him. But we noted that under the order giving custody of the petitioner to the mental health board,

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[18] *Id.* at 294, 691 N.W.2d at 557.

[19] *Id.* at 295, 691 N.W.2d at 558.

[20] *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003).

[21] *Id.* at 235, 665 N.W.2d at 9, quoting Neb. Rev. Stat. § 83-1027 (Reissue 1999) (now found at § 71-923).

the board "did not have authority to retain custody" after the seventh day.[22]

D.I. also cites the Court of Appeals' opinion in *Condoluci v. State*.[23] There, the sheriff took the petitioner into custody, purportedly under the SOCA, but the mental health board never held a hearing. The petitioner applied for a writ of habeas corpus, and the district court dismissed the application. The Court of Appeals held that the district court should have issued the writ because, if true, the petitioner's allegations showed that his detention was "quite clearly 'without any legal authority.'"[24]

Here, the critical issue is the fundamental purpose of the SOCA and its relationship with the 7-day time limit in § 71-1207. The Legislature's intent is expressed in § 71-1202, which states:

> The purpose of the [SOCA] is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others. It is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment. If voluntary treatment is not obtained, such persons shall be subject to involuntary custody and treatment only after mental health board proceedings as provided by the [SOCA]. Such persons shall be subjected to emergency protective custody under limited conditions and for a limited period of time.

D.I. and the respondents disagree about the breadth of the SOCA's purpose. The respondents argue that the paramount goal of the SOCA is to protect the public from dangerous sex offenders. D.I. concedes that the Legislature intended to protect the public but argues that this purpose is coequal with protecting a sex offender's liberty.

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[22] *Id.* at 236, 665 N.W.2d at 10.

[23] *Condoluci v. State*, 18 Neb. App. 112, 775 N.W.2d 196 (2009).

[24] *Id.* at 115, 775 N.W.2d at 198, quoting Neb. Rev. Stat. § 29-2801 (Reissue 2008).

We conclude that the respondents' reading most closely reflects the Legislature's intent. Although the SOCA has several aims, we have said that its "primary purpose" is to protect the public from sex offenders who continue to pose a threat.[25]

So understood, the fundamental purpose of the SOCA rebuts the presumption that the word "shall" in § 71-1207 creates a mandatory duty. We have noted our reluctance to find statutory time limits mandatory if they are not central to the purpose of the statute.[26] Holding a hearing within 7 days helps ensure that the basis for the mental health board's custody over the subject is adjudicated in a timely and orderly manner. A timely hearing is important, but we cannot say that it is necessary to accomplish the SOCA's fundamental purpose, such that the untimeliness of the hearing deprives the board of jurisdiction.

As was the Court of Appeals in *In re Interest of E.M.*, we are also impressed by the difficulty of remedying an untimely hearing. In D.I.'s petition for a writ of habeas corpus, he prayed for his "immediate release from the Norfolk Regional Center with no ongoing obligation for treatment." D.I. did not say how long he expected to be released. To the extent that he believed that he should forever be free of the Board's jurisdiction, because the 2006 hearing was untimely, the SOCA's purpose of protecting the public makes such a result unacceptable. But if D.I. is not so immune—and he conceded at oral argument that he is not—it appears that the county attorney could simply file another petition and request emergency protective custody.[27] While the absence of an express remedy is not the sine qua non of our inquiry,[28] it is hard to imagine a remedy in this case that would not be futile.

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[25] See *In re Interest of S.C.*, 283 Neb. 294, 301, 810 N.W.2d 699, 705 (2012).

[26] *State v. $1,947, supra* note 13. See, also, *State v. Steele, supra* note 11.

[27] See §§ 71-1205 and 71-1206(2).

[28] See *State on behalf of Minter v. Jensen*, *supra* note 14.

We are not persuaded by the cases that D.I. cites. In *Davis v. Settle*, we expressly "decline[d] to address the merits" of the petitioner's claim for habeas relief.[29] Our statement about the mental health board's authority was dicta. The mental health board in *Condoluci v. State* apparently never held a hearing at all.[30] Here, the Board held an untimely hearing.

[5] In conclusion, the 7-day time limit for holding a hearing under § 71-1207 is directory, not mandatory. D.I. did not show that the delay prejudiced him. He is not entitled to immediate release from his commitment at the Norfolk Regional Center.

Cross-Appeal

[6] Because we conclude that the district court correctly decided that the 7-day time limit in § 71-1207 is directory, we do not reach the respondents' cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[31]

CONCLUSION

We conclude that the 7-day time limit for holding a hearing under § 71-1207 is directory. So, the untimeliness of the 2006 hearing did not deprive the Board of jurisdiction. We therefore affirm the order dismissing D.I.'s petition for habeas relief.

Affirmed.

Heavican, C.J., and Stephan, J., not participating.

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[29] *Davis v. Settle, supra* note 20, 266 Neb. at 236, 665 N.W.2d at 9.

[30] See *Condoluci v. State, supra* note 23.

[31] *Lang v. Howard County*, 287 Neb. 66, 840 N.W.2d 876 (2013).