

**IN THE COURT OF APPEALS OF IOWA**

No. 0-204 / 09-0500  
Filed August 11, 2010

**IN RE THE DETENTION OF  
HAROLD JOHNSON,**

**HAROLD JOHNSON,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Story County, William J. Pattinson,  
Judge.

Johnson asserts the district court erred when it denied his motion for  
discharge. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Michael H. Adams,  
Assistant Public Defender, Civil Commitment Unit, for appellant.

Thomas J. Miller, Attorney General, Linda Hines and Susan Krisko,  
Assistant Attorneys General, for appellee State.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.\* Tabor, J.,  
takes no part.

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**VOGEL, P.J.**

Harold Johnson appeals from the district court's order denying his motion for discharge or sanctions. He asserts the district court should have granted his motion because after it was determined that a final hearing should be held pursuant to Iowa Code section 229A.8(5)(e) (2005), he did not receive the hearing within sixty days. We find that noncompliance with the sixty-day time frame set forth in section 229A.8(5)(e) does not require discharge. Moreover, section 229A.8(5)(e) requires that the court set a hearing within sixty days, which was complied with in the present case. Therefore, we affirm.

**CHAPTER 229A.** Iowa Code chapter 229A was enacted for the long-term treatment of sexually violent predators as well as for the protection of the public. See Iowa Code § 229A.1. Johnson was civilly committed as a sexually violent predator (SVP) on July 13, 2001.<sup>1</sup> Iowa Code section 229A.8 requires an annual review at which time the committed person may ask for a final hearing to determine whether he is eligible for discharge or placement in a transitional release program. Iowa Code section 229A.8(5)(e)<sup>2</sup> provides that in order to obtain a final hearing,

The burden is on the committed person to show by a preponderance of the evidence that there is competent evidence which would lead a reasonable person to believe a final hearing should be held to determine either of the following:

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<sup>1</sup> In order to be committed as a sexually violent predator, the State is required to prove beyond a reasonable doubt that the respondent is a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility.  
Iowa Code § 229A.2(11).

<sup>2</sup> We recognize this section has been reformatted since 2005, but for purposes of this appeal, the distinctions are inconsequential.

(1) The mental abnormality of the committed person has so changed that the person is not likely to engage in predatory acts constituting sexually violent offenses if discharged.

(2) The committed person is suitable for placement in a transitional release program pursuant to section 229A.8A.

If the committed person shows by a preponderance of the evidence that a final hearing should be held on either determination under subparagraph (1) or (2), or both, the court shall set a final hearing within sixty days of the determination that a final hearing be held.

*Id.* § 229A.8(5)(e).

**PROCEDURAL BACKGROUND.** Following Johnson's annual review in September 2006, the district court determined he was not entitled to a final hearing, concluding "that the respondent has not shown by a preponderance of the evidence that a final hearing should be held . . . respondent has not met the following factors in determining that he is suitable for transitional release [factors listed in opinion]." Johnson filed a petition for writ of certiorari, which was granted by our Iowa Supreme Court. In its October 10, 2008 decision, the court stated:

In determining whether the committed person is entitled to a final hearing, the district court should apply the following standard: if the committed person presents admissible evidence that could lead a fact finder to find reasonable doubt on the issue of whether his mental abnormality has changed such that he is unlikely to engage in sexually violent offenses, then the committed person should be granted a final hearing.

*Johnson v. Iowa Dist. Court*, 756 N.W.2d 845, 851 (Iowa 2008). The court found that Johnson's proof met the standard for a final hearing, sustained the writ of certiorari, and remanded the case. *Id.* Procedendo was issued on November 3, 2008.

Sixty days later, on January 2, 2009, a trial scheduling phone conference was held and the final hearing was set for February 24, 2009. While noting that

trial date, Johnson's counsel informed the prosecutor and court administration that he was not waiving Johnson's right to a timely trial and intended to file "a motion to dismiss on speedy trial grounds." On January 8, citing Iowa Code section 229A.8(5)(e), Johnson filed a motion requesting he be discharged, or in the alternative, the State be sanctioned, because he had not been brought to trial within the sixty days of the determination that he was entitled to a final hearing.<sup>3</sup> The State resisted the motion, arguing it had exercised due diligence through its communications with Johnson's attorney and court administration in its failed attempts to obtain a timely trial date. Following a hearing on February 2, Johnson's motion for discharge or sanctions was denied.<sup>4</sup>

Johnson proceeded to the final hearing on February 24, where the State had the burden of proving beyond a reasonable doubt that Johnson's mental abnormality had not changed. *Id.* at 850. The district court entered judgment on the jury's findings that "Johnson still has a mental abnormality that renders him likely to engage in predatory acts that constitute sexually violent offenses if he were to be discharged from civil commitment" and that he was "not at the present time suitable for transfer to a transitional release program." The court also found that "Johnson's hearing was not convened within the sixty days specified in Iowa Code section 229A.8A(5)(e)," but this did not entitle Johnson to be discharged

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<sup>3</sup> Johnson concedes the sixty days is calculated from the date procedendo issued from the Supreme Court. See *State v. Lybarger*, 263 N.W.2d 545, 547 (Iowa 1978) ("[O]rdinarily the trigger date would be the day the procedendo issued."), *Departed from on other grounds by State v. Zaehring*, 306 N.W.2d 792 (Iowa 1981).

<sup>4</sup> The record reveals the court communicated to the parties the motion would be denied, but no written ruling was made prior to the judgment entry filed on March 25, 2009.

nor require the State to be sanctioned. Johnson appeals the court's order that denied his motion for discharge or sanctions.

**SCOPE OF REVIEW.** We review issues concerning the statutory construction of Iowa Code chapter 229A for correction of errors at law. *In re Det. of Shaffer*, 769 N.W.2d 169, 172 (Iowa 2009).

**IOWA CODE SECTION 229A.8(5)(e).** Johnson asserts the district court erred in denying his motion for discharge or sanctions. Iowa Code section 229A.8(5)(e) provides in part:

If the committed person shows by a preponderance of the evidence that a final hearing should be held . . . the court shall set a final hearing within sixty days of the determination that a final hearing be held.

Johnson asserts that the sixty-day time frame set forth in section 229A.8(5)(e) is not directory, but mandatory. He further asserts that the State did not comply with the time frame and therefore, the district court erred in failing to grant his motion for discharge.

On July 2, 2010, our supreme court filed *In re Detention of Fowler*, \_\_\_N.W.2d \_\_\_ (Iowa 2010). In its decision the court specifically addressed Iowa Code section 229A.7(3), which pertains to an original adjudicatory hearing to determine whether a person is a sexually violent predator. The court noted,

Because the Iowa Legislature recognized that long-term confinement for treatment constitutes a potential deprivation of a liberty interest, the legislature included certain procedural protections in the SVP civil commitment act that are akin to those accorded criminal offenders who face imprisonment.

*Fowler*, \_\_\_ N.W.2d at \_\_\_ (citing Iowa Code § 229A.7 (2007) (providing for a commitment procedure that contains many of the due process rights afforded

criminal defendants)). The procedural protections set forth in Iowa Code section 229A.7 include:

Within ninety days after either the entry of the order waiving the probable cause hearing or completion of the probable cause hearing held under section 229A.5, the court *shall conduct* a trial to determine whether the respondent is a sexually violent predator. The respondent or the attorney for the respondent may waive the ninety-day trial requirement as provided in this section; however, the respondent or the attorney for the respondent may reassert a demand and the *trial shall be held* within ninety days from the date of filing the demand with the clerk of court. . . .

Iowa Code § 229A.7(3) (emphasis added). The court found the legislature's use of the word "shall" imposes a mandatory, not directory, duty to hold the trial within the statutorily prescribed time limits. *Fowler*, \_\_\_ N.W.2d at \_\_\_. Thus the failure to conduct a trial within the ninety-day limit caused Fowler prejudice as he was deprived of his liberty as a result of the delay; dismissal was required. *Id.* at \_\_\_. Johnson would have us construe Iowa code section 229A.8(5)(e) to reach the same result.

Before the district court, Johnson likened the State's failure to bring him to trial within sixty days from the issuance of procedendo to a violation of an accused's right to a speedy trial under our Iowa rules of criminal procedure. See Iowa R. Crim. P. 2.33(2)(b). He included in his argument that the State could not show good cause for the delay. The State responded, citing *Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S. Ct. 2072, 2085, 138 L. Ed. 2d 501, 519–20 (1997), which states that commitment proceedings of persons alleged to be sexually violent predators are civil in nature, and therefore the constitutional guarantee of a speedy trial is not applicable.

The district court rejected the application of the Iowa Rules of Criminal Procedure to civil commitment cases and as Johnson did not assert a constitutional violation, did not address the same. It found that “convening” a hearing within the sixty-day time frame is not essential to chapter 229A’s main objectives. Citing section 229A.1, it reasoned that “giving a civilly-committed sexual predator a technical basis to obtain a discharge does not, as I see it, protect the public’s safety, respect the needs of sexually violent offense victims or enhance the committed offender’s opportunities for treatment.” It also found that absent a showing of prejudice, a scheduling delay did not invalidate subsequent proceedings, as “Johnson failed to establish or even suggest that he was prejudiced in any discernible fashion by the 53-day delay in getting this case called for trial.” Finally, the court concluded “the omission of statutory consequence for failing to meet the hearing-scheduling deadline outlined in Section 229A.8(5)[(e)] indicates that the statute is merely directory and not mandatory.” We agree with the findings and conclusions of the district court.

Moreover, we note the language used in Iowa Code section 229A.8(5)(e) setting forth the procedures for a final hearing is not the same as the language used in section 229A.7(3) setting forth the procedures for an initial hearing.<sup>5</sup> For purposes of a final hearing, section 229A.8(5)(e) does not state that a hearing

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<sup>5</sup> We recognize that both Iowa Code sections 229A.7(3) and 229A.8(5)(e) implicate a respondent’s liberty interests. Section 229A.7 provides for an initial trial to determine whether a person is a sexually violent predator, such that the person’s liberty should be curtailed by commitment to a secure facility. In contrast, section 229A.8 provides for a hearing to determine whether a person should be discharged or released to a transitional program, after having rebutted the presumption that the commitment should continue by producing “admissible evidence that could lead a fact finder to find reasonable doubt on the issue of whether his mental abnormality has changed such that he is unlikely to engage in sexually violent offenses.” *Johnson*, 756 N.W.2d at 851.

*shall be held* as is the mandate in section 229A.7(3), but rather that “the court *shall set* a final hearing within sixty days of the determination that a final hearing be held.” We assume the legislature intends different meanings when it uses different terms in different portions of a statute. *Miller v. Marshall County*, 641 N.W.2d 742, 749 (Iowa 2002). In this case, the court did *set* a final hearing for Johnson on the sixtieth day following the issuance of procedendo. The district court complied with the statute.

Another difference we note between the two types of hearings is that for an initial determination under section 229A.7(3), there is a mechanism to determine whether a continuance should be granted upon the request of either party or by the court on its own motion.

The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. In determining what constitutes good cause, the court shall consider the length of the pretrial detention of the respondent.

Iowa Code § 229A.7(3). There is no corresponding language in section 229A.8 that would accommodate the needs of either party or the court should a continuance be requested. To stretch the language of section 229A.8 to read that a hearing must be *held* rather than *set* within sixty days would provide no procedural mechanism for the district court to hear and determine whether good cause would justify any delay. While the two code sections contain time frames for setting or holding hearings, the distinctions in both the words used and the procedures provided are significant.



**CONCLUSION.** While both Iowa Code section 229A.7(3) and section 229A.8 contain procedural time frames that could implicate a person's liberty interest, we find significant distinctions such that the district court did not err in concluding the time frame set forth in section 229A.8(5)(e) is directory. Therefore it properly denied Johnson's motion to discharge or for sanctions.

**AFFIRMED.**