

N.D.A.G. Letter to Wentz (Sep. 28, 1988)

September 28, 1988

Representative Janet Wentz
District 41
505 Eighth Avenue SE
Minot ND 58701

Dear Representative Wentz:

Thank you for your September 9, 1988, letter concerning whether under the North Dakota Century Code, a person arrested in a domestic dispute situation may be allowed to bond out immediately under a bond schedule like those set by courts for certain misdemeanor offenses or be held overnight or for a minimum hourly period.

In your letter you also asked a second question related to bail. Based on conversations with my staff, it is my understanding that you have withdrawn your request for an opinion on that issue, and, therefore, that question will not be discussed here.

Art. I, § 11 of the North Dakota Constitution provides in relevant part that

All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted.

The procedure for setting bail is set out in Rule 46 of the North Dakota Rules of Criminal Procedure. That rule states:

Any person charged with an offense, other than an offense punishable by death, shall, at his initial appearance before a magistrate, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate, unless the magistrate determines, in the exercise of his discretion, that release will not reasonably assure the appearance of the person as required.

N.D.R. Crim. P. 46(a)(1)(i). Therefore, although almost all persons shall be bailable, the bail need not be set until the initial appearance before a magistrate.

Magistrates are given the authority to order "that the defendant be discharged from actual custody upon an undertaking with sufficient sureties for his appearance." N.D.C.C. § 29-08-02. Certain offenses are of a nature where magistrates have determined that a set bond schedule will provide sufficient surety for appearance. These offenses are

generally traffic infractions, DUI, and other non-violent crimes. The bond or bail schedules allow a person charged with or arrested for an offense listed on the schedule to bond out immediately instead of waiting for bail to be set at the initial appearance.

However, in crimes of domestic violence, the Legislature has given magistrates an additional duty to perform before authorizing the release of the person charged or arrested; that duty prevents the inclusion of these domestic violence crimes on a bail schedule. N.D.C.C. § 12-64-04(1), provides in relevant part:

If a person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial, the court authorizing the release of the person shall consider and may issue, if there is no outstanding restraining or protection order prohibiting the person from having contact with the victim, an order prohibiting the person from having contact with the victim. The order must contain the court's directives and must inform the person that any violation of the order constitutes a criminal offense. The court shall provide a copy of the order to the victim.

(Emphasis supplied.) This section necessarily requires the magistrate to treat bail-setting in domestic violence situations on a case-by-case basis.

Domestic violence is defined as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault, on the complaining family or household members." N.D.C.C. § 12-64-01(1). "Family or household members" includes "spouses, former spouses, parents, persons related by blood or marriage, persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they are or have been married or have lived together at any time." N.D.C.C. § 12-64-01(2).

Consequently, as the magistrate is required to set bail in domestic violence cases on a case-by-case basis, immediate bonding out in those instances would be improper. An accused must be held until an initial appearance before a magistrate which, under N.D.R. Crim. P. 5, must occur without unnecessary delay. At the initial appearance, the magistrate must set bail as provided in N.D.R. Crim. P. 46 and consider the issuance of an order prohibiting the person from having contact with the victim.

As a practical matter, the magistrate may provide that in situations of domestic violence, bail may be set by telephone. The magistrate must, however, require that reasonable prior notice of that telephone conference be given to the state's attorney, as provided in N.D.C.C. § 29-08-16, and the magistrate still must consider the issuance of a no-contact order before releasing the alleged offender.

You also ask whether a person arrested for a crime related to domestic violence may be held for a minimum hourly period. No statute provides that the person arrested must or may be held for any set minimum hourly period. However, the requirement of an appearance before or telephone conference with a magistrate before release generally

will result in a delay of some hours before the person will be released.

In conclusion, a person arrested in a domestic dispute situation may not be allowed to bond out immediately as is allowed in some non-violent misdemeanor offenses. The person arrested must be brought before the magistrate for an initial appearance without unnecessary delay or bail may be set by telephone. In either case, the magistrate shall consider the issuance of a no-contact order before authorizing a release.

If you have any further questions, please feel free to contact me.

Sincerely,

Nicholas J. Spaeth

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