STATE OF MINNESOTA
IN COURT OF APPEALS
A11-696

Terry Lynn Olson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 30, 2012
Affirmed
Halbrooks, Judge

Wright County District Court
File No. 86-K4-05-3795

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Thomas N. Kelly, Wright County Attorney, Anne L. Mohaupt, Assisant County Attorney, Buffalo, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant, who in 2007 was convicted of a second-degree murder that took place in 1979, challenges the postconviction court's denial of his petition to resentence him

under the 1980 sentencing guidelines. Because appellant's 0-to-40-year sentence is proper according to 1979 law, the relevant sentencing laws have not changed since appellant was sentenced in 2007, and appellant's due process, equal protection, and ex post facto arguments do not warrant reversal, we affirm.

FACTS

In 2007, appellant Terry Lynn Olson was convicted of second- and third-degree murder in connection with the 1979 killing of J.H. At sentencing, Olson asked the district court to impose the sentence required by law in 1979 (the law in effect at the time of the murder): a 0-to-40-year indeterminate sentence with the possibility of parole. Appellant wanted that sentence because he believed that he would be paroled after 86 months as recommended by the *Parole Release Date Matrix* (1977). The state sought a determinate sentence of 367 months based on the 2007 sentencing guidelines. The district court agreed with Olson and ordered the 0-to-40-year sentence. In March 2010, the Minnesota Department of Corrections (DOC) announced that Olson's "target release date" would be in 204 months.

Olson petitioned for postconviction relief, asking the postconviction court to either modify his sentence to include a target release date of 86 months, *see* Minn. R. Crim. P. 27.03, subds. 9-10 (allowing for the correction of a sentence as necessary to comply with law or to fix clerical error), or to resentence him to the 1980 presumptive guidelines sentence of 116 months, *see* Minn. Stat. § 590.01, subd. 3 (2010) (permitting resentencing in some cases). The postconviction court summarily denied Olson's petition. Olson appeals.

D E C I S I O N

I.

Olson argues that the postconviction court erred by not resentencing him under the 1980 sentencing guidelines. This court reviews the summary denial of a petition for postconviction relief under an abuse-of-discretion standard. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). In doing so, we review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

The law under which the postconviction court could have resentenced Olson is Minn. Stat. § 590.01, subd. 3, which states:

> A person who has been convicted and sentenced for a crime committed before May 1, 1980, may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively, including resentencing under subsequently enacted law.
>
> No petition seeking resentencing shall be granted unless the court makes specific findings of fact that release of the petitioner prior to the time the petitioner would be released under the sentence currently being served does not present a danger to the public and is not incompatible with the welfare of society.

We conclude that the district court did not abuse its discretion by summarily denying Olson's petition for resentencing.

First, there has been no "significant change in substantive or procedural law" since Olson was sentenced in 2007. *See* Minn. Stat. § 590.01, subd. 3. Second, Olson was sentenced for committing murder. The supreme court has repeatedly stated it will not

second-guess a postconviction court's refusal to resentence a person convicted of committing a violent crime. *See, e.g.*, *Johnson v. State*, 331 N.W.2d 757, 758 (Minn. 1983). And third, the "interest of justice" does not require resentencing when Olson received the exact sentence he sought, and when the law regarding sentencing has not changed since he made his preference known.

II.

Olson argues alternatively that his due process, equal protection, and ex post facto rights have been violated by the postconviction court's denial of his petition.

Due Process

Olson claims that he was denied due process because the DOC set his target release date of 204 months without following the *Parole Decision-Making Guidelines* (1979) and the *Parole Release Date Matrix* (1977), depriving him of the legitimate liberty interest he had in the 86-month release date that he says he is entitled to under those guidelines.

The Due Process Clause of the U.S. Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To determine whether an individual's substantive due-process rights have been violated, this court conducts two inquiries. First, we consider "whether the complainant has a liberty or property interest with which the state has interfered," and second, we consider "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005).

Whether the state violated a prison inmate's due-process rights is a question of law, which we review de novo. *Id.*

In determining whether Olson has a liberty interest in his target release date, we consider whether the interest "arises from a legitimate claim of entitlement rather than simply an abstract need or desire or a unilateral expectation." *Id.* In doing so, we note that state law can create a legitimate liberty interest in a prison release date. *Id.* at 769 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975 (1974)). In *Carrillo*, the supreme court held that in 1980, Minnesota created such an interest by adopting a determinate sentencing scheme. *Id.* at 772-73.

But as Olson requested, he was sentenced under the old, indeterminate sentencing scheme. Under that scheme, there is no legitimate entitlement to a specific release date. *See State ex rel. Taylor v. Schoen*, 273 N.W.2d 612, 618 (Minn. 1978) (noting that the matrix is a set of guidelines and not a determinate sentence); *see also Carrillo*, 701 N.W.2d at 772 n.6 (explaining how the determinate sentencing scheme that creates a legitimate liberty interest in a release date is not present in indeterminate sentencing).

Notwithstanding the indeterminate sentencing scheme under which Olson was sentenced, Olson argues that the *Parole Decision-Making Guidelines* create a legitimate entitlement to the target release date recommended by the *Parole Release Date Matrix*, which is 86 months. Olson relies primarily on the decision-making guidelines and matrix. At most, the guidelines provide an entitlement to a target release date that is based on relevant considerations including "the risk of failure on parole." The DOC set a 204-month release date to allow Olson time to utilize programming that, in its opinion,

would lower Olson's risk of reoffending. The date set is therefore based on a consideration that is permissible under the guidelines.

Because Olson has not shown that the state interfered with a legitimate liberty interest in a specific release date, this court's due-process analysis ends with the first inquiry; there is no need to address whether the procedures associated with the deprivation were constitutionally sufficient. *Carrillo*, 701 N.W.2d at 768.

Equal Protection

Olson asserts that his rights under the Equal Protection Clause were violated. The Equal Protection Clause guarantees that "similarly situated individuals receive equal treatment." *State v. Frazier*, 649 N.W.2d 828, 837 (Minn. 2002). "A statute violates the [E]qual [P]rotection [C]lause when it prescribes different punishments or different degrees of punishment for the same conduct committed under the same circumstances by persons similarly situated." *Id.* To justify different treatment in the parole context, the state need only show a rational basis for the different treatment. *Taylor*, 273 N.W.2d at 620. The burden is on Olson to prove an equal-protection violation. *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). We review the merits of Olson's equal-protection argument de novo. *See id.*

Olson fails to meet his burden because he has not shown that he was treated differently than those who are similarly situated. Olson attempts to meet his burden by claiming that the state treated him differently than it treated six second-degree murderers paroled in 1978, who, on average, each served approximately nine years in prison. Olson's argument fails for two reasons. First, we cannot presume that all second-degree

murderers who were eligible for parole in 1978 were actually paroled that year, and Olson provides no data about individuals who were denied parole. Second, Olson was not going to be paroled in 1978, because he committed murder in 1979.

We also add that Olson's 0-to-40-year sentence is consistent with the 1979 law and therefore presumptively in accordance with equal protection. *See Bettin v. State*, 396 N.W.2d 249, 251 (Minn. App. 1986) ("A prisoner is not denied equal protection of the laws . . . so long as the sentence was imposed according to the statute applicable at the time of sentence."), *review denied* (Minn. Dec. 17, 1986).

Ex Post Facto

Olson claims the application of Minn. Stat. § 244.03 (2010), which permits sanctioning of inmates who refuse to participate in rehabilitative programming, was applied to him in violation of the Ex Post Facto Clause, which protects individuals from being subject to laws that increase punishment for acts that they have already committed. *See Rud v. Fabian*, 743 N.W.2d 295 (Minn. App. 2007) (discussing the prohibited ex post facto application of Minn. Stat. § 244.03 to prisoners sentenced before 1999); *see also* U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. I, § 11. Because Olson did not make this argument to the district court, he has waived the issue on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Affirmed.