STATE OF MINNESOTA
IN COURT OF APPEALS
A11-784

In the Matter of the Risk Level Determination of W. E. W.

Filed December 5, 2011
Affirmed; motion denied
Schellhas, Judge

Office of Administrative Hearings
OAH Docket No. 2-1100-21932-2

W.E.W., Moose Lake, Minnesota (pro se relator)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

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

SCHELLHAS, Judge

In this certiorari appeal, relator challenges the dismissal of his request for review of his risk-level assignment as moot. He argues that his risk-level assignment was not supported by sufficient evidence, his due-process rights were violated when his appeal was dismissed, and his counsel was ineffective. Relator also moves to strike the confidential appendix filed by respondent End-of-Confinement Review Committee

(ECRC). We deny relator's motion to strike, and we affirm the order of the administrative law judge (ALJ) dismissing relator's appeal as moot.

FACTS

From 1991 to 2001, relator W.E.W. was convicted of four sex-related crimes. In September 2008, while W.E.W. was incarcerated for attempted first-degree burglary and ineligible person in possession of a firearm, ECRC assigned him a risk level of three.

In December 2008, while he was still incarcerated, Kandiyohi County moved to civilly commit W.E.W. as a sexual psychopathic personality (SPP) and as a sexually dangerous person (SDP). In October 2009, after a trial on the commitment petition, the district court issued its final order indeterminately committing W.E.W. to the Minnesota Sex Offender Program as an SPP and SDP.

W.E.W. sought administrative review of his risk-level assignment by an ALJ. In March 2011, ECRC moved to dismiss W.E.W.'s risk-level review as moot because he is civilly committed and another ECRC assessment will be required prior to W.E.W.'s release. The ALJ dismissed W.E.W.'s appeal of his risk-level assignment. This certiorari appeal follows.

D E C I S I O N

Relator's Motion to Strike

We first address W.E.W.'s motion to strike ECRC's entire confidential appendix as containing documents that are irrelevant to the appeal and outside the record on appeal. ECRC's confidential appendix contains copies of the district court's initial order

for commitment and indeterminate order for commitment in the civil-commitment proceeding, a copy of this court's unpublished opinion affirming the commitment orders (*In re Commitment of Wills*, No. A09-2227 (Minn. App. June 8, 2010), *review dismissed* (Minn. Sept. 29, 2010)), a copy of ECRC's motion to dismiss W.E.W.'s risk-level appeal as moot, and a copy of the ALJ's order granting the motion to dismiss.

The papers filed in the district court or agency proceedings, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases. Minn. R. Civ. App. P. 110.01, 115.04, subd. 1. The record for judicial review must be the proceedings and actions of the agency or body. *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 676 (Minn. 1990). ECRC's motion to dismiss, along with an attached copy of this court's unpublished opinion, and the ALJ's order granting the motion to dismiss are properly part of the record for this appeal.

ECRC acknowledges that copies of the district court's orders in the civil-commitment proceeding were not provided to the ALJ. These are public records, of which an appellate court may take judicial notice. *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010). We therefore deny W.E.W.'s motion to strike the confidential appendix filed by ECRC.

Dismissal as Moot

W.E.W. argues that the ALJ erred when he dismissed as moot W.E.W.'s appeal of his risk-level assignment. He argues that his appeal is not moot because his risk-level assignment has collateral consequences because once an offender is assigned a risk level

of three, the offender's records are automatically reviewed for civil commitment. ECRC argues that civil commitment is not a collateral consequence of a risk-level assignment, noting that the assignment of risk levels and civil commitments are governed by different statutes, section 244.052 (2008) and chapter 253B (2008), respectively, and that the civil-commitment statute does not require the commitment of offenders with risk levels of three.

"The issue of whether a cause of action is moot is a question of law, which we review de novo." *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). The mootness doctrine applies to judicial proceedings in Minnesota. *Id.* (citing *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005)). "[T]he doctrine of mootness applicable to judicial proceedings is equally applicable to review hearings conducted under Minn. Stat. § 244.052, subd. 6." *Id.*

Minnesota law requires the commissioner of the department of corrections to "make a preliminary determination" as to whether, "in the commissioner's opinion," a civil-commitment petition may be appropriate for those who have been convicted of certain sex-related crimes and who are "in a high risk category." Minn. Stat. § 244.05, subd. 7(a) (2008). If the commissioner determines that a petition may be appropriate, the commissioner forwards the information to the appropriate county attorney. *Id.*, subd. 7(c). The county attorney, "if satisfied that good cause exists, will prepare the petition." Minn. Stat. § 253B.185, subd. 1 (2008). A district court then holds a hearing on the petition. *Id.* "High risk category" is defined neither in section 244.05, subdivision 7, nor in caselaw.

But even assuming that "high risk category" refers to the risk-level assignment in section 244.052, any connection between the commissioner's preliminary determination and civil commitment is too speculative to be considered a collateral consequence. The collateral-consequences doctrine requires a more direct effect. *See, e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 237, 88 S. Ct. 1556, 1559 (1968) (holding that petitioner's cause was not moot because as consequence of conviction, he could not engage in certain businesses, serve as official of labor union for specified period of time, vote in New York State, or serve as juror). On account of these sorts of collateral consequences, a case is not moot. *Id.*

Here, although W.E.W. neither alleged nor produced any evidence to show that the commissioner actually reviewed his file, his collateral-consequence argument implies that a review occurred. Based on an assumption that the commissioner did conduct such a review, we conclude that W.E.W.'s civil commitment is not a collateral consequence of his risk-level-three assignment. For persons convicted of certain sex-related crimes and categorized as high risk, the law requires the commissioner to conduct a preliminary determination about whether commitment may be appropriate. Minn. Stat. § 244.05, subd. 7(a). If the commissioner determines that commitment may be appropriate, the commissioner must forward the determination to the county attorney. *Id.*, subd. 7(c). But even if the commissioner recommends commitment to the county attorney, the county attorney must then find "good cause" before filing a petition. Minn. Stat. § 253B.185, subd. 1. The commissioner's preliminary determination does not automatically trigger civil commitment.

W.E.W. also argues that his case is not moot because "incarcerated prisoners always meet the justiciable controversy doctrine." W.E.W. is correct that in some cases, convicted persons can challenge their convictions and survive a mootness inquiry under the collateral-consequences doctrine. *Carafas*, 391 U.S. at 237, 88 S. Ct. at 1559. But W.E.W. is not incarcerated; he is being treated as a civilly committed person. We are unaware of any legal authority to support W.E.W.'s argument.

Under Minnesota law, W.E.W.'s appeal from his administrative end-of-confinement risk-level determination is moot because he is civilly committed. *J.V.*, 741 N.W.2d at 616. Consequently, the ALJ did not err in dismissing W.E.W.'s request for administrative review. We therefore do not reach the merits of W.E.W.'s argument that his risk-level assignment was erroneous.

Due Process

W.E.W. argues that the ALJ violated his due-process rights when the ALJ dismissed his case as moot without a hearing on the merits. He argues that due process requires a hearing on the merits of his appeal. Although W.E.W.'s due-process claim is muddled and asserted without persuasive authority, we address it to the extent that we understand it.

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909 (1976) (quotation omitted). Minnesota law provides offenders with "the right to seek administrative review of an end-of-

confinement review committee's risk assessment determination." Minn. Stat. § 244.052, subd. 6(a). But this right is subject to proper application of the doctrine of mootness. *See* Minn. R. 1400.5500(k) (2007) (providing that ALJ shall "recommend dismissal where the case or any part thereof has become moot"); *J.V.*, 741 N.W.2d at 614 (stating that "the doctrine of mootness applicable to judicial proceedings is equally applicable to review hearings conducted under Minn. Stat. § 244.052, subd. 6"). Moreover, another ECRC will be required prior to W.E.W.'s release, at which time W.E.W. will be entitled to be heard. Because the ALJ properly applied the doctrine of mootness to W.E.W.'s appeal from his risk-level determination, we conclude that W.E.W.'s due-process argument is without merit.

Ineffective-Assistance-of-Counsel Claim

W.E.W. claims that his counsel was ineffective because he informed W.E.W. by letter that his case was moot.

> The Sixth Amendment guarantees a defendant the effective assistance of counsel. *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L.Ed.2d 763 (1970)). To demonstrate that he did not receive effective assistance of counsel, [a defendant] "must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Yang*, 774 N.W.2d 539, 564–65 (Minn. 2009); *see also Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). We "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

State v. Nissalke, 801 N.W.2d 82, 111 (Minn. 2011). "[O]bjective reasonableness requires an attorney to exercise the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Id.* (quotation omitted). Because W.E.W.'s counsel correctly advised him about the application of the doctrine of mootness to his appeal and the effect on it, counsel's performance did not fall below an objective standard of reasonableness. Because our conclusion with respect to the performance prong of the *Strickland* test is determinative, we do not reach the second prong of the test. W.E.W.'s claim that his counsel was ineffective is without merit.

Affirmed; motion denied.