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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1477, A08-1537

Raymond L. Semler,
Appellant (A08-1477),

Raymond L. Semler, et al.,
Plaintiffs (A08-1537),

Lionel Tohannie Yazzie,
Appellant (A08-1477),

Richard Russell Fageroos, Jr.,
Plaintiff, (A08-1477),
Appellant (A08-1537),

James Hilton,
Appellant (A08-1477),

vs.

Cal Ludeman, Commissioner of Department of Human Services, et al.,
Respondents.

Filed August 18, 2009
Affirmed
Toussaint, Chief Judge

Ramsey County District Court
File No. 62-CV-07-3977

Raymond L. Semler, # 206261, Moose Lake Annex, 1111 Highway 73, Moose Lake, MN 55767-9452 (pro se appellant)

Lionel Tohannie Yazzie, Moose Lake Annex, 1111 Highway 73, Moose Lake, MN 55767-9452 (pro se appellant)

Richard Russell Fageroos, #120565, MCF-Stillwater, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se appellant)

James Hilton, Moose Lake Annex, 1111 Highway 73, Moose Lake, MN 55767-9452 (pro se appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.*

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

TOUSSAINT, Chief Judge

Appellants Raymond L. Semler, Lionel Tohannie Yazzie, Richard Russell Fagroos, Jr., and James Hilton challenge the district court's dismissal of their suit against respondents Cal Ludeman, Commissioner of Department of Human Services, and 18 employees of the Minnesota Sex Offender Program (MSOP), alleging statutory and constitutional violations in their confinement. Because appellants' complaint fails to state any sustainable grounds for relief, we affirm.

D E C I S I O N

Appellants are convicted sex offenders committed to MSOP. Respondents are the administrator and employees of the Minnesota Department of Human Services, employed at MSOP, who were involved with transferring appellants to a different MSOP facility and placing them in isolation for a period of days. Appellants were physically restrained

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

during the transfer and subject to other minor indignities. Isolation involved further restraints and deprivations of varying degrees, including diminished access to hygiene products, outside communication, and general comfort. Appellants were told that the actions were motivated by suspicion that they were involved in a plan to riot and/or escape from MSOP.

Appellants sued; the factual recitation in their complaint describes the transfer and isolation. Respondents moved for dismissal based on failure to state a claim and insufficient service of process. After submission of written memoranda and a hearing, the district court dismissed the complaint in its entirety.

With respect to whether the district court had jurisdiction over respondents in their individual capacities, the court concluded that it did not have personal jurisdiction because appellants did not serve the individual respondents with a summons. *See* Minn. R. Civ. P. 3.01 (stating that service of summons commences civil action). Appellants did not raise this issue in their brief, and we deem it waived. *See Zimmerman v. Safeco Ins. Co. of Am.*, 593 N.W.2d 248, 251 (Minn. App. 1999) ("[I]ssues not raised or argued in an appellant's brief are waived."), *aff'd*, 605 N.W.2d 727 (Minn. 2000). We therefore affirm dismissal of claims against respondents in their individual capacities for failure of service.

Likewise, the district court dismissed appellants' "brief and vague" constitutional claims for failure to comply with Minn. R. Civ. P. 8.01. The rule requires a complaint to include a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* The complaint stated only that respondents "have and continue to violate"

appellants' due-process and equal-protection rights. Although a court has various alternatives for addressing violations of rule 8, the drastic sanction of dismissing with prejudice may be proper. *See* Minn. R. Civ. P. 41.02(a) (authorizing district court to "dismiss an action or claim for failure to prosecute or to comply with" Minnesota Rules of Civil Procedure); *see also Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (upholding dismissal of "verbose, confusing and . . . conclusory" complaint after failure to address court's request for compliance with rule 8). In any event, appellants did not challenge rule-8 dismissal in their brief, and we therefore deem it waived. *See Zimmerman*, 593 N.W.2d at 251.

The district court dismissed appellants' constitutional claims on the alternative ground of "failure to state a claim upon which relief can be granted." *See* Minn. R. Civ. P. 12.02(e). To survive a motion to dismiss on these grounds, a plaintiff has to allege sufficient facts to make out the stated grounds for relief. *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003). We review rule-12 dismissal de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The facts alleged in the complaint are taken as true and all inferences must be drawn in favor of the nonmoving party. *Id.* When constitutional violations are alleged, increased scrutiny is applied and "dismissal is proper only when the defendant demonstrates the complete frivolity of the complaint." *Schocker v. State Dept. of Human Rights*, 477 N.W.2d 767, 769 (quotation and emphasis omitted) (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992).

The facts alleged in the complaint render appellants' claimed constitutional violations frivolous. "An essential element of an equal protection claim is that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. June 19, 2007). Appellants do not compare themselves to anyone in their complaint and have not pointed to any material characteristic they share with others who were not subject to the challenged actions. Appellants failed to state an equal-protection claim.

Appellants also failed to establish a due-process claim. Their factual recitation describes their transfer between two facilities within MSOP, physical restraints imposed during and after the transfer, and restrictions placed on them during isolation. But appellants did not provide evidence that the state interfered with a substantive liberty or property interest or failed to provide constitutionally sufficient procedures attendant to the deprivation.

Appellants do not have a right to be free from transfer or isolation within the program. Patients in MSOP may be transferred to any facility in the program "capable of providing proper care and treatment." Minn. Stat. 253B.14 (2008). Authority for patient restraint or isolation is granted in Minn. Stat. § 253B.03, subd. 1a (2008), and in Minn. R. 9515.3090, subpart 4. Indeed, some interference with appellants' liberty is necessarily incident to confinement. *See Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006) (finding that curtailment of committed person's liberty interests is constitutionally permissible). *Cf. Ingraham v. Wright*, 430 U.S. 651, 674, 97 S. Ct. 1401, 1414 (1977)

(noting that some impositions are de minimis and do not implicate constitutional protections). Taking appellants' description of events as true, MSOP staff had some valid basis for transferring and isolating them. Even if appellants were not actually involved in a plan to escape or riot, they have not alleged that MSOP had no reason for believing that they were. Nothing in appellants' allegations indicates that the actions were arbitrary, capricious, or undertaken merely for staff convenience.

As for physical restraint, a person confined by the state has a right to be free from unreasonable restraints. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458 (1982). But appellants do not describe unreasonable use of physical restraints. Appellants' complaint shows that the restraints did not cause any injury other than to leave a mark for a few days. The restraints were incident to the transfer and temporary placement in isolation.

Nor do the other restrictions or conditions imposed on appellants have any constitutional significance. It is true that those subject to state confinement not founded on criminal conviction may not be punished. *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872 (1979). But conditions of confinement do not constitute punishment if an alternative purpose for the conditions may be assigned, and if the conditions are not "excessive in relation to [that] purpose." *Id.* at 538, 99 S. Ct. at 1874. Otherwise, conduct by officials rises to the level of a substantive-due-process violation only if it shocks the conscience. *Mumm v. Mornson*, 708 N.W.2d 475, 487 (Minn. 2006). Taking appellants' description of their transfer and isolation as true, none of the staff's behavior amounts to a constitutional violation. Some deprivation was necessary to ensure that the

suspected riot or escape did not come to pass. The restrictions imposed were not excessive in relation to that purpose. Other conditions not directly related to preventing riot or escape (the failure to provide shower shoes, for example) do not shock the conscience. Appellants were inconvenienced, frustrated, or made uncomfortable at times. But their due-process rights were not violated.

Lastly, the district court dismissed the statutory grounds for relief in appellants' complaint because the statutes relied upon do not authorize civil suit. Appellants assert violations of the patients' bill of rights, Minn. Stat. § 144.651 (2008), and a similar section of the civil-commitment statute, Minn. Stat. § 253B.03.

Whether a statute creates a cause of action is a question of statutory interpretation. *Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007). A statute gives rise to a cause of action only if "the language of the statute is explicit or it can be determined by clear implication." *Id.* We consider three factors in determining whether a cause of action can be implied: (1) whether the appellants are among the "special class of persons for whose benefit the statute was enacted," (2) whether the legislature indicated its intent regarding a private remedy, and (3) whether inferring a private remedy would be consistent with the statute's purpose. *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 916 (Minn. App. 2003).

Assuming that appellants satisfy the first factor, the causes of action cannot be inferred because both statutes provide an alternative remedy. The patients' bill of rights vests exclusive authority with the commissioner of health to address violations of the enumerated rights. Minn. Stat § 144.653, subd. 1 (2008). Section 253B.03 provides

civilly committed persons the same grievance procedure required under the patient's bill of rights. *See* Minn. Stat. § 144.651, subd. 20 (requiring facilities to have "written internal grievance procedure that . . . sets forth the process to be followed; specifies time limits . . . ; [provides] the assistance of an advocate; requires a written response . . . ; and provides for a timely decision by an impartial decision maker"). In this way, the legislature has provided a remedy for rights granted in section 253B.03. As the supreme court noted in *Becker*, courts should avoid imputing a cause of action where a statute has explicitly provided an alternative remedy. 737 N.W.2d at 207. For this reason, we do not imply a cause of action under either statute.

Because we have affirmed dismissal of appellants' cause of action in its entirety, we do not reach the question of whether respondents were entitled to immunity.

Affirmed.