This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2064

State of Minnesota, ex rel.,
Joshua Sather, petitioner,
Appellant,

vs.

Tom Roy, Commissioner of Corrections,
Respondent.

Filed July 10, 2017
Affirmed
Bratvold, Judge

Anoka County District Court
File No. 02-CV-16-4192

Cathryn Middlebrook, Chief Appellate Public Defender, Michael J. McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori M. Swanson, Attorney General, Lindsay K. Strauss, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Bratvold, Judge; and J. Smith, Judge.[*]

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

UNPUBLISHED OPINION

BRATVOLD, Judge

In this habeas appeal, appellant challenges a supervised-release condition that requires him to complete a sex-offender treatment program that mandates he take responsibility for his convicted offenses. Appellant argues that this condition: (1) is unworkable; (2) violates his Fifth Amendment right against self-incrimination; and (3) violates substantive due process. Because appellant's release condition is workable and does not violate his constitutional rights, we affirm.

FACTS

Procedural History

In June 2006, a jury convicted appellant Joshua Sather of first- and second-degree criminal sexual conduct for sexually abusing G.T., a family relative who was nine years old at the time. The district court sentenced Sather to 12 years in prison and a mandatory five-year conditional-release term.[1] On January 29, 2008, this court affirmed Sather's convictions on direct appeal. *See State v. Sather*, No. A06-2040, 2008 WL 224030 (Minn. App. Jan. 29, 2008), *review denied* (Minn. Apr. 29, 2008).

In April 2009, Sather filed a petition for postconviction relief, which the district court denied as procedurally barred. On February 2, 2010, this court affirmed. *See Sather v. State*, No. A09-1326, 2010 WL 346444 (Minn. App. Feb. 2, 2010), *review denied* (Minn. May 18, 2010).

---

[1] Sather's full prison sentence, including the five-year conditional-release term, is projected to expire in 2022.

In August 2010, Sather filed a petition for a writ of habeas corpus in federal district court, asserting violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and claiming that he was "innocent and wrongfully imprisoned." *Sather v. Dooley*, Civil No. 10–3080 (JRT/JJG), 2012 WL 1005012, at *1–2 (D. Minn. Mar. 26, 2012), *appeal dismissed* (8th Cir. June 21, 2012). In March 2012, the district court denied Sather's habeas petition, concluding that his claims were procedurally barred because they were not fairly presented in state court. *Id.* at *2.

Supervised Release

On March 19, 2014, respondent the Commissioner of Corrections released Sather from prison on intense supervision and required him to complete an approved sex-offender treatment program. Sather enrolled in an approved treatment program but asserted his innocence throughout treatment. In August 2014, Sather was terminated from the program because he refused to accept responsibility for his crimes. According to a letter from a program representative, "[t]reatment cannot treat an individual who refuses to admit to his crime or take any responsibility for his crime."

On August 21, 2014, the Department of Corrections' (DOC) Hearings and Release Unit (HRU) held a parole-revocation hearing. Sather's parole agent stated that Sather was "a high risk to reoffend" and recommended revoking Sather's supervised release because he had failed to complete treatment. Sather's attorney told the hearings officer that Sather was "willing to do whatever he needs to do to keep from going back to prison, but he won't admit to something he didn't do." A private investigator, who appeared on behalf of Sather, informed the hearings officer that G.T. had recanted his trial testimony because it was not

"altogether true." But the hearings officer found this evidence "not very credible," revoked Sather's supervised release, and reincarcerated him.

During the next review hearing in March 2015, Sather's parole agent recommended extending Sather's incarceration for additional release planning because Sather had requested to attend a "deniers" program in the metropolitan area, which was outside his parole supervision area. In October 2015, Sather made a formal written request to the HRU to modify his release condition so he could attend a deniers treatment program that would not require his admission of guilt. At a hearing, Sather's parole agent stated that Sather "expressed he is not interested in release planning and has not provided release placement options." The hearings officer denied Sather's modification request, extended his incarceration, and ordered that re-release was "contingent upon an agent-approved plan."

In November 2015, Sather appealed the October 2015 decision to the HRU Executive Officer. Sather asserted that his release condition violated the Fifth Amendment privilege against self-incrimination because compelling him to admit guilt during treatment creates a risk of perjury prosecution. The Executive Officer denied the appeal.

In August 2016, Sather filed this habeas petition, arguing that the condition of completing a sex-offender treatment program that requires him to admit guilt: (1) is unworkable; (2) violates his Fifth Amendment privilege against self-incrimination, and (3) violates substantive due process. After the parties completed their briefing in the district court, but before the district court filed its order, Sather filed a notarized affidavit in support of his petition, stating that "under penalty of perjury, I repeat that I am innocent of the charge of sexually abusing G.T."

The district court denied Sather's petition, concluding that his release condition was not "unworkable" because whether Sather chooses to accept responsibility for his offenses is "fully" within his control. The district court also determined that Sather's release condition does not violate his Fifth Amendment rights because he would not have a "real" risk of a perjury prosecution if he were compelled to admit guilt during treatment, nor does it violate his substantive due-process rights because it survives rational-basis review. Sather appeals.[2]

D E C I S I O N

The Minnesota constitution guarantees the privilege of filing a petition for a writ of habeas corpus. Minn. Const. art. I, § 7. The legislature has codified this privilege, extending the right to people who are "imprisoned or otherwise restrained of liberty." Minn. Stat. § 589.01 (2016). A habeas petitioner may bring "claims involving fundamental constitutional rights and significant restraints on [the petitioner's] liberty or to challenge the conditions of confinement." *Guth*, 716 N.W.2d at 26–27; *see also State v. Schnagl*, 859 N.W.2d 297, 302 (Minn. 2015) (stating that habeas petitioner may challenge DOC decisions regarding parole revocation). A habeas petitioner bears the burden of showing the illegality of his detention or restraint. *Bedell v. Roy*, 853 N.W.2d 827, 829 (Minn. App.

---

[2] While Sather's habeas petition was pending in the district court, the DOC re-released him from prison on intense supervision. Neither party argues that Sather's re-release renders his habeas petition moot. During oral arguments in this court, counsel informed this court that Sather remains on supervised release, subject to the same conditions. Therefore, we conclude that Sather's habeas claims still present a live controversy. *See State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26–27 (Minn. App. 2006) (stating that a habeas petitioner may assert challenges to the restraint on his liberty, including to his "fundamental constitutional rights"), *review denied* (Minn. June 13, 2006).

2014). "The district court's findings in support of a denial of a petition for a writ of habeas corpus are entitled to great weight and will be upheld if reasonably supported by the evidence." *Aziz v. Fabian*, 791 N.W.2d 567, 569 (Minn. App. 2010). We review legal questions, including constitutional issues, de novo. *State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001).

I. Sather's release condition is workable.

Courts accord agencies deference, recognizing that they have expertise and "special knowledge in the field of their training, education, and experience." *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 792 (Minn. 1999), *overruled on other grounds by Johnson v. Fabian*, 735 N.W.2d 295, 300–09 (Minn. 2007). The legislature has granted the commissioner of corrections statutory authority over the supervision and discipline of offenders who are confined in Minnesota correctional facilities, including the manner of their supervised release. *State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 276–77 (Minn. 2016); *see generally* Minn. Stat. § 243.05 (2016) (describing commissioner's powers); Minn. Stat. § 244.05, subd. 3 (2016) (providing commissioner with authority to sanction parolees for violating conditions of release). The commissioner may place an offender on intense supervision and require completion of sex-offender treatment as a release condition if the commissioner determines that it is in the interests of public safety. Minn. Stat. § 244.05, subd. 6(a), (b) (2016); Minn. R. 2940.1900; *see also Roth v. Comm'r of*

Corrections, 759 N.W.2d 224, 227–28 (Minn. App. 2008) (describing commissioner's authority to direct sex offenders to participate in treatment).[3]

When the commissioner exercises his authority, he must "fashion conditions of release that are workable and not impossible to satisfy." *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 793 (Minn. App. 2008). If a condition "becomes unworkable at the time of release due to circumstances largely outside the control of an offender, the DOC must consider a restructure or modification" of the condition.[4] *Id.* at 796–97; *see* Minn. R. 2940.2700 (providing process for parolees to request restructuring of their release conditions).

The release condition at issue here is completion of an approved sex-offender treatment program that requires the admission of guilt. Sather argues that this condition is unworkable because it is impossible to admit a crime he believes he did not commit; therefore, he contends he is unable to satisfy this release condition and he will be forced to serve his full sentence in prison. Sather argues that the DOC must restructure his condition so that he may attend a deniers treatment program, which the record reflects only exists outside his supervision area. We are not persuaded.

---

[3] Through its rulemaking power, the commissioner has delegated authority to the HRU to approve conditions of release, impose sanctions for violations, and revoke release. Minn. R. 2940.0300; *see also* Minn. Stat. § 243.05, subd. 4 (2016) (permitting the commissioner to delegate his powers).

[4] The state contends that the rule from *Marlowe* is mere dicta. This argument lacks merit. The rule stated above was the holding in *Marlowe*, thus, it is not dicta. *See State v. Soukup*, 656 N.W.2d 424, 430–31 (Minn. App. 2003) (stating that dicta is "a statement that reaches beyond the actual dispute before the court" and is "not part of the court's opinion"), *review denied* (Minn. Apr. 29, 2003).

First, Sather has not identified any deniers treatment programs available to him, or submitted any evidence establishing that he is eligible to begin treatment at a deniers program. To the contrary, the record shows that Sather has been uncooperative in developing a release plan with his parole agent, and he has failed to suggest alternative treatment options that meet the applicable criteria. Sather's case is distinguishable from *Marlowe* where the parolee was unable to find any approved housing in his supervision area to meet his release condition, although it was "clear that a suitable residential placement [was] available in a neighboring county." 755 N.W.2d at 793, 796. In contrast, Sather was admitted into an approved sex-offender treatment program and attended treatment sessions, as he acknowledges. Approved treatment programs remain available to Sather, so it is not impossible for him to satisfy his release condition.

Second, Sather's parole agent has stated that he does not believe that a deniers program would be beneficial to Sather, and that he should be required to attend one of the treatment programs in his supervision area. Sather's agent, having been delegated authority to supervise Sather's release conditions, receives deference based on his experience and training in the field. *See* Minn. Stat. § 243.05, subd. 6(c) (providing commissioner authority to appoint parole agents to supervise parolees); *see also* Minn. R. 2940.2000, subp. 3 (stating that parolees are required to "at all times follow the instructions of their supervising agent"). We conclude it was within the DOC's discretion to require Sather to attend a treatment program in his supervision area.

II. Sather's release condition does not violate his Fifth Amendment privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination, applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself."[5] U.S. Const. amend. V; *Johnson*, 735 N.W.2d at 299. Two elements must exist for the Fifth Amendment privilege to apply: compulsion and incrimination. *Johnson*, 735 N.W.2d at 299. The Minnesota Supreme Court has held that extending a prisoner's incarceration for refusal to admit offenses during sex-offender treatment is compulsion under the Fifth Amendment. *Id.* at 309. Thus, it is undisputed that compulsion was present in this case when the DOC revoked Sather's supervised release and reincarcerated him for refusing to take responsibility for his offenses during sex-offender treatment.

This appeal turns on the incrimination element, which is satisfied when a compelled answer would "support a conviction" or "furnish a link in the chain of evidence needed to prosecute the claimant." *Id.* A statement is not incriminating if there is only a "trifling or imaginary" risk of incrimination. *Id.* Compelled statements about a conviction may be incriminating: (1) when "a direct appeal of that conviction is pending, or . . . the time for direct appeal of that conviction has not expired"; and (2) even when a direct appeal has expired, if the statements create "the possibility of a perjury charge." *Id.* at 309–11. But "once a direct appeal has concluded and the risk of a perjury prosecution is absent or has

---

[5] Sather only asserts a Fifth Amendment violation under the United States Constitution and does not make any arguments specific to the Minnesota Constitution.

expired," the Fifth Amendment no longer attaches to compelled statements concerning the crime of conviction. *Roth*, 759 N.W.2d at 229.

Here, Sather's direct appeal is no longer pending, so the first circumstance does not apply. Sather argues the Fifth Amendment protects his refusal to answer questions about his sex offenses during treatment because there is a real risk of a perjury prosecution and he will forfeit any future exoneration based on his "actual innocence." We first address the risk of a perjury prosecution and then turn to Sather's collateral-attack argument.

Unlike previous appellate decisions addressing this issue, Sather did not testify at trial or plead guilty. *Compare Johnson*, 735 N.W.2d at 310–11 (concluding that appellant's compelled admission during sex-offender treatment would be incriminating because it would create a real risk of a perjury prosecution based on appellant's assertion of innocence during his trial testimony), *with Roth*, 759 N.W.2d at 229 (concluding that appellant's compelled admission during sex-offender treatment would not be incriminating because appellant's direct appeal expired and he had no risk of a perjury prosecution because he pleaded guilty). Sather nonetheless claims his compelled admission during treatment would create a "real and appreciable" risk of a perjury prosecution based on his assertions of innocence in his: (1) unsworn testimony at the parole revocation hearings, (2) 2010 federal habeas petition, and (3) sworn affidavit filed in support of his current habeas petition. We will address each claim in turn.

First, Sather's unsworn statements during administrative hearings do not create a real risk of perjury prosecution because only sworn statements are subject to perjury prosecution. *State v. Mertz*, 801 N.W.2d 219, 222 (Minn. App. 2011); *see also* Minn. Stat.

Ann. § 609.48 advisory comm. cmt. (West 1963) ("The crime of perjury is primarily concerned with preventing the giving of false information *under oath or affirmation*." (emphasis added)). Indeed, this court has strictly construed the perjury statute and held that it requires a "formal oath." *Mertz*, 801 N.W.2d at 222.[6]

Sather contends that his unsworn statements subject him to perjury prosecution because the statements *could* have been made under oath. *See* Minn. Stat. § 609.48, subd. 1(1) (providing that a statement made during a proceeding in which the law authorizes the statement to be made under oath is subject to perjury). Sather relies on a regulation under the Administrative Procedure Act (APA), which allows the DOC to administer sworn testimony at public hearings on proposed agency rules. Minn. R. 1400.2210, subp. 8; *see also* Minn. Stat. § 243.05, subd. 2 (2016) (stating that the DOC may adopt rules according to the APA). The revocation hearings at issue in this case, however, did not occur in the context of a public rule hearing. Therefore, Sather's assertions of innocence during the administrative hearings do not create a risk of perjury prosecution.

---

[6] Sather contends that "*Mertz* is no longer good law" because the legislature has since amended Minn. Stat. § 358.116 (2016), which states that a non-notarized court document that is signed under penalty of perjury has the same force and effect as a formally sworn court document. *See* Minn. Stat. § 609.48, subd. 1(4) (2016) (providing that statements made according to Minn. Stat. § 358.116 are subject to perjury). We disagree. The advisory committee comments to the perjury statute state that the statute imposes criminal penalties "for false testimony given under oath," but it does "not attempt to define when an oath is required." Minn. Stat. Ann. § 609.48, advisory comm. cmt. Thus, *Mertz* may be applied in light of the section 358.116 amendments, which redefine how written statements are made under oath.

Second, we consider Sather's statements in his 2010 federal habeas petition, which is not found in the appellate record.[7] We do not consider matters outside the record. Minn. R. Civ. App. P. 110.01; *Thomas A. Foster & Assocs., LTD v. Paulson*, 699 N.W.2d 1, 9 (Minn. App. 2005). We recognize, however, that the federal district court noted in its decision that Sather claimed he is "innocent and wrongfully imprisoned." *Sather*, 2012 WL 1005012, at *1. Even if Sather made sworn statements of his innocence in his federal habeas petition, he does not face a real risk of perjury prosecution because the applicable statute of limitations has expired. *See Johnson*, 735 N.W.2d at 311. Minnesota has a three-year limitations period for perjury prosecution. Minn. Stat. § 628.26(k) (2016). The limitations period for a possible perjury prosecution based on Sather's statements in his federal habeas petition expired in August 2013, before Sather participated in sex-offender treatment in August 2014. Sather argues that the statute of limitations was tolled because he fraudulently concealed the truth and his prior assertions of innocence were "ongoing" crimes. But Sather does not cite any precedent applying either doctrine in the context of a perjury prosecution. We conclude that the statute of limitations was not tolled.

Third, we consider Sather's sworn affidavit filed in support of his current habeas petition. Sather argues that because his affidavit maintains his innocence, was notarized and signed under penalty of perjury, he could be subject to perjury if he is compelled to admit guilt during treatment. *See* Minn. Stat. § 609.48, subd. 1(1), (4) (providing that false

---

[7] Sather filed a reply memorandum in the district court, which states that his federal habeas petition is attached as "Exhibit A." But the district court register of actions does not reflect that Exhibit A was ever filed.

written statement made under oath or affirmation is subject to perjury). The district court rejected the affidavit as creating a real risk of a perjury prosecution because it was made "to bolster his perjury argument." We agree.

Sather's after-the-fact assertion of innocence is insufficient to create a Fifth Amendment claim. A habeas petitioner is not required to file an affidavit in support of his habeas petition. Minn. Stat. § 589.04 (2016) (providing requirements for a habeas petition). We are unconvinced that a petitioner may first assert that his imprisonment violates the Fifth Amendment, and then later file an affidavit in the *same* proceeding to create the Fifth Amendment violation.

Sather's final argument is that being compelled to admit guilt violates his Fifth Amendment privilege because he will forfeit a prospective postconviction appeal based on actual innocence. This argument also lacks merit. In *Roth*, this court held that the pendency or possibility of a collateral attack on a conviction does not extend the Fifth Amendment privilege against self-incrimination if "a direct appeal has concluded and the risk of a perjury prosecution is absent or has expired."[8] 759 N.W.2d at 229. As discussed, Sather's direct appeal has expired, and he faces no real risk of perjury prosecution. Therefore, the

---

[8] *Roth* reaffirmed *State ex rel. Henderson v. Fabian*, which held that, "absent a showing of manifest injustice, once appellant's direct review had concluded, he no longer enjoyed a Fifth Amendment privilege to refuse to participate in the sex-offender treatment program." 715 N.W.2d 128, 133 (Minn. App. 2006), *rev'd*, *Johnson*, 735 N.W.2d 295. The supreme court reversed *Henderson* but on a different issue. It is unclear after *Roth* whether manifest injustice is still required to grant habeas relief on Fifth Amendment grounds when the time for direct review has expired and the petitioner does not have a real risk of a perjury prosecution. We note, in any event, that Sather has not established that it would be manifestly unjust to deny habeas relief on Fifth Amendment grounds.

Fifth Amendment privilege does not protect Sather's compelled admission of guilt during treatment.

III. Sather's release condition does not violate substantive due process.

Substantive due process protects people "from certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999). Sather argues the release condition that requires him to admit guilt during treatment violates substantive due process because it "forces [him] to make a private, sexual admission that violates his deeply held personal belief that he is innocent." When a petitioner frames his substantive due-process interests in light of a more "particular amendment," that amendment applies, "not the more generalized notion of substantive due process." *Mumm v. Mornson*, 708 N.W.2d 475, 482 (Minn. 2006) (quotation omitted). We conclude that the Fifth Amendment is the more particular amendment that applies to Sather's argument, and we have already fully considered his Fifth Amendment claims. Therefore, we decline to separately analyze Sather's substantive due-process claim.

Affirmed.