STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0169

Randy Lee Morrow, petitioner,
Appellant,

vs.

Tom Roy,
Commissioner of Corrections,
Respondent.

Filed July 17, 2017
Affirmed
Toussaint, Judge*

Rice County District Court
File No. 66-CV-16-2216

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Toussaint, Judge.

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

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

TOUSSAINT, Judge

On appeal from the district court's dismissal of his habeas petition, appellant Randy Lee Morrow argues that the commissioner of corrections violated Minn. Stat. § 244 (2014), his due-process rights, his right to counsel, and his First Amendment rights, by imposing discipline that extended his sentence by 540 days for refusal to participate in sex-offender treatment. We affirm.

D E C I S I O N

"A person imprisoned or otherwise restrained of liberty . . . may apply for a writ of habeas corpus to obtain relief from imprisonment or restraint." Minn. Stat. § 589.01 (2016). "A writ of habeas corpus may also be used to raise claims involving fundamental constitutional rights and significant restraints on a defendant's liberty or to challenge the conditions of confinement." *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26-27 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006). The parties agree that habeas corpus is the appropriate remedy in this case. *See State v. Schnagl*, 859 N.W.2d 297, 301 (Minn. 2015) ("The writ of habeas corpus is a remedy available to a confined person to obtain relief regarding the custody imposed, or the length of confinement in a given case."). This court reviews questions of law de novo. *Guth*, 716 N.W.2d at 26.

I.

Under Minnesota law, the commissioner of corrections "shall provide for a range of sex offender programs, including intensive sex offender programs, within the state adult correctional facility system." Minn. Stat. § 241.67, subd. 3(a) (2014). Minn. Stat. § 244.03

(2014) allows the commissioner to "impose disciplinary sanctions upon any inmate who refuses to participate in rehabilitative programs."

When he committed his current first-degree criminal sexual conduct offense, appellant had two previous convictions for criminal sexual conduct. Upon his incarceration for the current offense, appellant was evaluated and asked to sign a treatment agreement to initiate his participation in the Minnesota Sex Offender Program (MSOP). Under prison disciplinary rules, appellant could not "refuse to enter into [sex offender] treatment" when asked to do so, and the failure to comply with this requirement could result in his receiving up to 720 days of additional incarceration as a penalty.

The facts alleged by appellant can only lead to the conclusion that he refused to enter treatment as required. Correctional facility personnel explained to appellant the MSOP mandate, the expectation that he enter treatment, and the consequences of his failure to do so. Appellant nevertheless refused to sign the agreement to enter treatment, insisting, among other things, that he was entitled to legal counsel. His actions were deemed a refusal, and he was subject to disciplinary proceedings that resulted in the extension of his supervised release date by 540 days. The commissioner had the authority to impose discipline under the circumstances presented, and the record fully supports the commissioner's determination that appellant refused to enter treatment.

II.

"The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to counsel." *State v. Camacho*, 561 N.W.2d 160, 170 (Minn. 1997). Because the right to counsel is "basic to our adversary system of criminal justice, [it is] part of the due process

of law that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." *Faretta v. California*, 422 U.S. 806, 818, 95 S. Ct. 2525, 2532 (1975) (quotation and footnote omitted). But the Sixth Amendment right to legal counsel applies only to "criminal prosecutions." U.S. Const. amend. VI. The right "attaches at the initiation of adversary judicial criminal proceedings," because "[i]t is only at that time that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *United States v. Gouveia*, 467 U.S. 180, 189, 104 S. Ct. 2292, 2298 (1984) (quotation omitted).

The general rule is that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 2975 (1974); *see Baxter v. Palmigiano*, 425 U.S. 308, 315, 96 S. Ct. 1551, 1556 (1976) (same). An exception exists if the conduct of the inmate constitutes a crime which could be prosecuted under state law; under those circumstances, the inmate may be entitled to representation by counsel. *Baxter*, 425 U.S. at 315, 96 S. Ct. at 1556. This exception does not apply when a prison disciplinary hearing is "not part of a criminal prosecution." *Id.* (quotation omitted).[1]

[1] "The view that the right to counsel does not attach until the initiation of adversary judicial proceedings has been confirmed by this Court in [many] cases. . . . That interpretation of the Sixth Amendment right . . . is consistent not only with the literal language of the Amendment, which requires the existence of both a criminal prosecution and an accused, but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the core purpose of the counsel guarantee is to assure aid at trial, when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Gouveia*, 467 U.S. at 188-89, 104 S. Ct. at 2297-98 (quotations omitted).

Appellant was subject to prison discipline for his refusal to participate in sex-offender treatment, which is not a crime. His Sixth Amendment right to counsel was therefore not violated because he was not entitled to counsel in his prison disciplinary matter.

Relying on *Carrillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005), appellant argues that the failure to appoint him counsel for the disciplinary proceeding was also a violation of his procedural due-process rights. In *Carrillo*, the supreme court held that prisoners have a protected liberty interest in their supervised release dates under the Due Process Clause of the United States Constitution, and set the fact-finding standard to be used by the department of corrections to protect that interest. 701 N.W.2d at 773, 777; *see Wolff*, 418 U.S. at 558, 94 S. Ct. at 2976 (finding a sufficient liberty interest to trigger due-process protections in a prison disciplinary matter). *Carrillo* does not alter the rule of law from *Wolff* and other cases, however, with regard to the Sixth Amendment right to counsel. Procedural due-process rights protected under *Carrillo* do not guarantee the right to counsel. Appellant's procedural due-process rights were satisfied in his disciplinary matter, as he was given a hearing and allowed to present evidence and cross-examine witnesses before a decision was reached. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (stating that the fundamental requirement of due process is the opportunity to be heard, such as at some form of hearing and "at a meaningful time and in a meaningful manner" (quotation omitted)). The Due Process Clause did not mandate that appellant be appointed counsel in his prison disciplinary matter.

III.

Appellant argues that the commissioner violated his First Amendment right to freedom of speech by extending his "supervised release date by 540 days for maintaining his innocence." The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, mandates Congress to "make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I; Minn. Const. art. I, § 3. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977). As noted by appellant, *Johnson v. Fabian* recognizes that the threat of an extension of incarceration for the refusal to admit to sex crimes has been recognized in Minnesota as "compulsion," but only in the context of the Fifth Amendment right against self-incrimination, and only during the period when the underlying conviction is not final, including the pendency of a direct appeal. 735 N.W.2d 295, 310 (Minn. 2007).

Appellant was not disciplined for "maintaining his innocence," as he claims, but for refusing to sign an agreement to receive sex-offender treatment. He assumes that during treatment he would have been required to admit to facts that provided the factual basis for his criminal conviction. MSOP requires participants to "discuss[] information about . . . past sexual behaviors and the people [the offender] victimized"; offenders are not required to provide incriminating information about their offenses. This issue is premature and not ripe for review, as appellant has not yet been asked to admit to any of his past conduct. "[O]n appeal there must be a substantial and real controversy between the parties before a

case will be considered by [an appellate] court." *State v. Brown*, 216 Minn. 135, 138, 12 N.W.2d 180, 181 (1943); *see State v. Murphy*, 545 N.W.2d 909, 918 (Minn. 1996) (refusing to consider the constitutionality of an inmate's probationary condition that required him to live outside of the Twin Cities area upon release from prison, because the inmate was not yet eligible for release and the issue was thus "speculative and not ripe for review").[2]

Affirmed.

[2] "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 119, 97 S. Ct. 2532, 2535 (1977) (syllabus). "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804 (1974). Rehabilitation is a penological goal, as is reducing recidivism. *Id.*, 417 U.S. at 823, 94 S. Ct. at 2804; *McKune v. Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 2024 (2002). There is wide agreement that "clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *McKune*, 536 U.S. at 33, 122 S. Ct. at 2024. Therefore, appellant's First Amendment rights may be limited due to his incarceration.