STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1621

John Kotowski,
Appellant,

vs.

Jodi Harpstead, Commissioner of Human Services, et al.,
Respondents,

Paul Schnell, Commissioner of Corrections,
Respondent.

Filed July 6, 2021
Affirmed
Hooten, Judge

Carlton County District Court
File No. 09-CV-20-1358

John J. Kotowski, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Rachel Bell-Munger, Assistant Attorney General, St. Paul, Minnesota (for respondent Schnell)

Keith Ellison, Attorney General, Anthony R. Noss, Assistant Attorney General, St. Paul, Minnesota (for respondents Harpstead and Johnston)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this appeal from the district court's denial of his petition for a writ of habeas corpus, appellant challenges the district court's order determining that respondent Commissioner of the Department of Corrections (DOC)[1] did not err by recalculating the start date of his conditional-release term and denying his request for an evidentiary hearing. We affirm.

FACTS

In 1998, a jury found appellant John Joseph Kotowski guilty of two counts of criminal sexual conduct in the first degree and one count of kidnapping for offenses committed in 1997. He was sentenced to concurrent prison sentences of 292 months for the criminal sexual conduct conviction, 57 months for the kidnapping conviction, and five years of conditional release under Minn. Stat. § 609.346, subd. 5 (1996).[2]

In July 1998, the district court amended Kotowski's sentence, after recognizing that he had previously been convicted of criminal sexual conduct in 1987. Because Minn. Stat. § 609.346 (1996) required a ten-year conditional-release term for individuals convicted of a second sex offense, the district court ordered that Kotowski "be placed on conditional

[1] Other respondents are officials with the Minnesota Department of Human Services (DHS). Kotowski is currently committed to DHS's Minnesota Sex Offender Program (MSOP). The DHS respondents did not file a brief because Kotowski does not challenge the lawfulness of the MSOP confinement.

[2] The statutory provision for conditional-release terms based on sex offenses has been recodified a number of times since 1996; the current provision is found in Minn. Stat. § 609.3455, subd. 6 (2020).

release for 10 years, minus any time served on supervised release, after [he] ha[d] completed the sentence imposed."

When Kotowski was sentenced, the DOC calculated the expiration date of an offender's sentence according to the principle—supported by then-current Minnesota caselaw—that a conditional-release term runs concurrently with any supervised-release term. *See State v. Koperski*, 611 N.W.2d 569, 573 (Minn. App. 2000) ("[S]upervised release and conditional release periods must run concurrently."), *abrogated by State ex rel. Pollard v. Roy*, 878 N.W.2d 341 (Minn. App. 2016), *vacated and remanded* (Minn. Dec. 27, 2016), *aff'd on similar grounds*, 2017 WL 1833209 (Minn. App. May 8, 2017), *review denied* (Minn. July 18, 2017). Applying this principle to Kotowski's sentence, the DOC projected that Kotowski's supervised-release term would expire in 2022 and his conditional-release term would expire in 2023.

In April 2013, the DOC recalculated the projected expiration date of Kotowski's conditional-release term in light of two decisions from this court. In *State ex rel. Peterson v. Fabian*, we held that a conditional-release term imposed for failure to register as a predatory offender under Minn. Stat. § 243.166, subd. 5a (2008), runs consecutively to, rather than concurrently with, the offender's supervised release term. 784 N.W.2d 843, 846 (Minn. App. 2010). In *State ex rel. Cote v. Roy*, a nonprecedential order opinion, we concluded that consecutive calculation also applied to conditional-release terms for sex offender convictions imposed under Minn. Stat. § 609.109, subd. 7(a) (2002). No. A11-0727 (Minn. App. Nov. 15, 2011), *review denied* (Minn. Jan. 25, 2012). Based on these cases, the DOC clarified that Kotowski's conditional-release term would begin after his

supervised-release term concluded and that his conditional-release term would expire in 2032.

Kotowski was released from prison and placed on supervised release in November 2014. Kotowski's supervised-release term expires in February 2022, and his conditional-release term is currently set to expire in February 2032. State law, however, provides that an offender in Kotowski's situation, who has a previous sex offense, "shall be placed on conditional release for ten years, *minus the time the person served on supervised release*." Minn. Stat. § 609.346, subd. 5(a) (emphasis added).[3] Accordingly, the DOC indicated in its briefing to the district court that it will conduct an audit of Kotowski's sentence after his supervised-release term expires and will reduce the duration of his conditional-release term by the time served on supervised release.

In August 2020, Kotowski petitioned pro se for a writ of habeas corpus, arguing that the DOC erroneously calculated his conditional-release term. The district court denied his petition without a hearing because it determined that, as a matter of law, the DOC properly calculated his conditional-release term in accordance with our decisions in *Peterson* and *Cote*. Kotowksi appeals.

[3] Because the applicable statutory language reduces the conditional-release term only by "the time the person served on supervised release," and not the "supervised-release term," Kotowski would not receive credit towards his conditional-release term for time his release is revoked during the supervised-release term. *See State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 278 (Minn. 2016).

DECISION

A writ of habeas corpus is a statutory civil remedy available to obtain relief from unlawful imprisonment or restraint. Minn. Stat. § 589.01 (2020). On review of a denial of a petition for a writ of habeas corpus, the district court's findings "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 questions of law de novo. *Id.*

I. The district court did not err by finding that the DOC correctly recalculated Kotowski's conditional-release term under *Peterson* and *Cote*.

Kotowski argues that his sentence expired without being amended to include a conditional-release term and that upon expiration of the sentence, the court lost jurisdiction to amend it under *State v. Purdy*. 589 N.W.2d 496, 498 (Minn. App. 1999) ("The expiration of a sentence operates as a discharge that bars further sanctions for a criminal conviction."). Kotowski is mistaken. Before the district court recalculated the projected expiration date of Kotowski's conditional-release term in April 2013, his sentence was set to expire in 2022 when his supervised-release term was projected to expire. Therefore, the district court recalculated Kotowski's conditional-release term before his sentence expired, which does not violate *Purdy*.

Kotowski also contends that the DOC miscalculated his conditional-release term based on *Peterson* and *Cote*, which he argues do not apply to his case. Kotowski's argument fails. In *Peterson*, we held that "a conditional-release term for failure-to-register [as predatory] offenders under Minn. Stat. § 243.166, subd. 5a, is consecutive to a supervised-release term." 784 N.W.2d at 846. The basis for our conclusion was our

interpretation of the plain language of subdivision 5a, which stated that "the court shall provide that *after* the person has completed the *sentence* imposed, the commissioner shall place the person on conditional release for ten years." *Id.* (alteration in original). We concluded that, because "the 'sentence' includes both the term of imprisonment and the term of supervised release, the conditional-release term under Minn. Stat. § 243.166, subd. 5a, does not commence until after both the term of imprisonment and the term of supervised release are completed." *Id.*

In *Cote*, we extended *Peterson*'s holding to a sex offender subject to a conditional-release term imposed under Minn. Stat. § 609.109, subd. 7(a). *Cote*, No. A11-0727. That statute, like the version of section 243.166 analyzed in *Peterson*, stated that conditional release begins "after the person has completed the sentence imposed." Minn. Stat. § 609.109, subd. 7(a). The relevant statutory language at issue in *Peterson* and *Cote* is nearly identical. *Compare* Minn. Stat. § 243.166, subd. 5a ("[A]fter the person has completed the sentence imposed, the commissioner shall place the person on conditional release."), with Minn. Stat. § 609.109, subd. 7(a) ("[A]fter the person has completed the sentence imposed, the commissioner of corrections shall place the person on conditional release."). Both statutes stated that conditional release begins after the sentence is served, and our holding in *Peterson* depended on this clear statutory language. *See Peterson*, 784 N.W.2d at 846 ("[W]e apply the clear language of section 243.166, subdivision 5a, that 'the court shall provide that *after* the person has completed the *sentence* imposed, the commissioner shall place the person on conditional release for ten years.'" (alteration in original)). We concluded in *Cote* that we could discern no reason for an outcome different

from the one in *Peterson* simply because Cote's conditional-release term was imposed under Minn. Stat. § 609.109, subd. 7(a), rather than Minn. Stat. § 243.166, subd. 5a. No. A11-0727.

Kotowski's conditional-release term was imposed under a substantively similar statute to that at issue in *Cote*.[4] As in *Cote*, we determined that there was no reason for a different outcome from *Peterson*. Moreover, post-*Cote* cases support the conclusion that a conditional-release term commences after a person has completed the sentence imposed. *See Duncan*, 887 N.W.2d at 274 (upholding the DOC's 2012 recalculation of a conditional-release term imposed under Minn. Stat. § 609.109, subd. 7, to run consecutively in light of *Peterson* and *Cote*); *Pollard*, 878 N.W.2d at 349-50 (abrogating *Koperski*'s holding that supervised-release and conditional-release periods run concurrently when addressing a conditional-release term imposed under Minn. Stat. § 609.3455, subd. 6).

Because the DOC's recalculation of Kotowski's conditional-release term is consistent with the caselaw in *Purdy*, *Peterson*, and *Cote*, the district court did not err by finding that the DOC's recalculation was correct.

II. The district court did not err by concluding that the DOC did not violate Kotowski's due-process rights or the prohibition against ex post facto laws when it recalculated his conditional-release term.

Kotowski argues that the DOC's application of the *Peterson* and *Cote* decisions to him violates the prohibition against ex post facto laws and his due-process rights. We

[4] The conditional-release statute was codified at Minn. Stat. § 609.109, subd. 7 (2002), when Cote was sentenced. That statute was superseded by Minn. Stat. § 609.3455, subd. 6, which is currently in effect. *See* 2005 Minn. Laws ch. 136, art. 2, § 21, at 929-31. The statutes are substantively similar.

address Kotowski's ex post facto claim first. Both the United States and Minnesota Constitutions contain ex post facto clauses that prohibit states from imposing punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that prescribed. U.S. Const. art. I, § 10; Minn. Const. art. I, § 11; *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981); *Rew v. Bergstrom*, 845 N.W.2d 764, 790 (Minn. 2014). To constitute an ex post facto law, a statute must be a criminal or penal law, it must not be "merely procedural," it must "apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29 n.12, 101 S. Ct. at 964 n.12; *State v. Moon*, 463 N.W.2d 517, 521 (Minn. 1990).

Kotowski does not challenge a statute or other law imposing a new punishment upon him. Rather, he challenges both the DOC's decision to apply the plain language of section 609.346 to his sentence and appellate court decisions interpreting that same language. Kotowski relies on multiple nonbinding cases, which are too numerous to cite, involving defendants who received more severe punishments for their crimes than were permissible by law at the time they committed their crimes. Not only are those cases nonbinding on this court, but also none of those cases resemble this case, where the district court sentenced Kotowski to the conditional-release term set forth in Minn. Stat. § 609.346, subd. 5 (1996), which existed at the time he committed his 1997 offense. Our decisions in *Peterson* and *Cote* simply clarified the meaning of the statutory language as used in the then existing conditional-release statutes, and the DOC applied that clarification to Kotowski. The DOC did not retroactively apply any law to impose additional punishment on Kotowski, and therefore Kotowski's ex post facto argument lacks merit.

As to Kotowski's due-process claim, to the extent that it is based on his objection to the DOC's recalculation in light of the *Peterson* and *Cote* decisions, his argument is the same as his ex post facto argument and again fails because no new punishment was imposed on him. To the extent that Kotowski's due-process claim is based on the contention that he was entitled to notice before the DOC recalculated his conditional-release term, that procedural-due-process claim is forfeited because Kotowski makes it for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). In any event, the argument fails on its merits because Kotowski does not identify any due-process interest that is violated by the DOC recalculating his conditional-release term based on intervening caselaw without advance notice or any state law or authority requiring the DOC to hold a hearing before recalculating it. *See Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005) (explaining that, to establish procedural-due-process violation by DOC, offender must establish that DOC interfered with a protected liberty interest and lacked procedure to adequately protect that interest). Therefore, the district court did not err by concluding that the DOC did not violate Kotowski's due-process rights or the prohibition against ex post facto laws when it recalculated his conditional-release term

III. The district court did not abuse its discretion by denying Kotowski's petition for a writ of habeas corpus without a hearing.

Kotowski argues that the district court abused its discretion by denying his petition for a writ of habeas corpus without an evidentiary hearing. An evidentiary hearing on a habeas petition is unnecessary if a petitioner fails to allege sufficient facts to establish a prima facie case for relief or if the petition does not show a factual dispute. *Seifert v.*

Erickson, 420 N.W.2d 917, 920 (Minn. App. 1988). Because Kotowski failed to allege sufficient facts to establish a prima facie case for relief and he did not identify a factual dispute, Kotowski's petition could be decided as a matter of law and no evidentiary hearing was necessary. The district court therefore did not err by deciding Kotowski's habeas petition without an evidentiary hearing.

Affirmed.