This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0042
A21-0043

Ricky Lee McDeid,
Appellant (A21-0042),

Shane P. Garry,
Appellant (A21-0043),

vs.

Nancy Johnston,
CEO/Director, Minnesota Sex Offender Program, et al.,
Respondents.

Filed August 2, 2021
Affirmed
Reyes, Judge

Ramsey County District Court
File No. 62-CV-19-8232

Roxanna V. Gonzalez, Dorsey & Whitney LLP, Minneapolis, Minnesota; and

Andrew J. Pieper, Stoel Rives LLP, Minneapolis, Minnesota (for appellants)

Keith Ellison, Attorney General, Aaron Winter, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In these consolidated appeals, appellants, who are civilly committed sex offenders, challenge the district court's immunity-based dismissal of their procedural due-process claims for damages. They argue that respondents-officials are not entitled to qualified immunity because appellants have a constitutionally protected liberty interest in a transfer to community preparation services (CPS) within a reasonable time of a commitment appeal panel (CAP) order approving the transfer. Because such a right was not clearly established under law at the time of these alleged violations, we affirm.

FACTS

Appellants Ricky Lee McDeid and Shane P. Garry were civilly committed to the Minnesota Sex Offender Program (MSOP) in 1999 and 2012, respectively. Appellants petitioned the Minnesota commitment appeal panel (CAP)[1] for transfer to community preparation services (CPS), a less-restrictive facility "designed to assist civilly committed sex offenders in developing the appropriate skills and resources necessary for an eventual successful reintegration into a community." Minn. Stat. § 246B.01, subd. 2a (2020).

The CAP granted McDeid's and Garry's "petition[s] for transfer to a less restrictive facility (CPS)" on September 21, 2017 and January 24, 2018, respectively. The orders

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[1] We refer to the entity formerly known as the supreme court appeal panel or statutorily as the judicial appeal panel as the CAP. *See* Minn. Stat. § 253D.28, subd. 1(a) (2020) (providing for rehearing and reconsideration by "the judicial appeal panel established under section 253B.19, subdivision 1"); Minn. Stat. § 253B.19, subd. 1 (2020) (providing that "[t]he supreme court shall establish an appeal panel").

stayed entry of judgment for 15 days but did not specify a deadline for the transfers. No party appealed the CAP's orders.

On November 20, 2019, appellants, who still awaited transfer, initiated an action in district court against respondents-officials Nancy Johnston, CEO/Director of MSOP, and Jodi Harpstead, commissioner of the department of human services, in their individual and official capacities. The complaints alleged that respondents' failure to transfer appellants in a timely manner violated their due-process rights under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983, and requested damages. Also on November 20, 2019, appellants petitioned the district court for writs of mandamus to compel respondents to comply with the CAP's orders to transfer appellants to CPS.

On December 11, 2019, approximately 796 days from the effective date of the CAP order, MSOP transferred McDeid to CPS. On July 29, 2020, approximately 902 days after the effective date of the CAP order, MSOP transferred Garry to CPS.

Neither appellant sought review from this court of the petitions for writs of mandamus as MSOP transferred them by the time of the district court's order dismissing the complaints. Respondents moved to dismiss the complaints for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e), asserting that they were entitled to qualified immunity. The district court granted respondents' motions, determining that, although appellants sufficiently pleaded a due-process violation based on respondents' failure to transfer them to CPS within a reasonable time, respondents are nevertheless entitled to qualified immunity. This appeal follows.

DECISION

Appellants argue that the district court erred by concluding that respondents are entitled to qualified immunity because appellants had a clearly established right at the time of the alleged violations to be transferred to CPS within a reasonable time of the CAP orders granting their transfer. We disagree.

When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, we review the legal sufficiency of the claim de novo to determine "whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

The applicability of immunity is a legal question that we review de novo. *Mumm v. Mornson*, 708 N.W.2d 475, 483-84 (Minn. 2006). An official's conduct is subject to qualified immunity if it "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). "[Q]ualified immunity questions should be resolved at the earliest possible stage to shield [officials] from disruptive effects of broad-ranging discovery and effects of litigation." *Elwood v. Rice Cty.*, 423 N.W.2d 671, 675 (Minn. 1988). To determine the applicability of qualified immunity, courts consider a two-prong test: (1) whether the plaintiff alleged facts showing the violation of a statutory or constitutional right and (2) whether the plaintiff had a right "clearly established" at the time

of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 231-32, 129 S. Ct. 808, 815-16 (2009).

Under the first prong, the district court concluded that appellants alleged sufficient facts showing the violation of a statutory or constitutional right. Specifically, the district court reasoned that appellants had a legitimate claim of entitlement to transfer to CPS upon a final CAP order. The district court noted that appellants alleged that respondents effectively ignored the CAP order by failing to transfer them to CPS for 796 days and 902 days, an unreasonable period of time. Citing *Kropp*, a case involving a CAP order for provisional discharge in which this court held that respondents lack authority to grant or deny discharge petitions, the district court concluded that respondents could not disobey a CAP order. [*Id.*] *See In re Civil Commitment of Kropp*, 895 N.W.2d 647, 652 (Minn. App. 2017) (noting that executive director cannot unilaterally prevent provisional discharge pending an appeal despite CAP's grant), *review denied* (Minn. June 20, 2017).

Assuming without deciding that appellants alleged sufficient facts showing violation of a statutory or constitutional right, we are not persuaded that appellants had a clearly established right to transfer to CPS within a reasonable time of a final CAP order at the time of the alleged violations.

Whether appellants had a clearly established right at the time of the alleged violations is a legal question that we review de novo. *See Mumm*, 708 N.W.2d at 483-84 (Minn. 2006) (stating that whether law regarding right is "clearly established is a legal question for the court"). Conduct violates clearly established law when "the contours of a right are sufficiently clear [such] that every reasonable official would have understood that

what [they are] doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) (quotations omitted). While we do not require a case directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (citing *Malley*, 475 U.S. at 341, 106 S. Ct. at 1096). The United States Supreme Court has repeatedly directed courts "not to define clearly established law at a high level of generality" but rather focus on "whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 308 (2015) (quotation omitted) (noting that "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition" (quotations omitted)).

Appellants rely on two federal criminal cases for the proposition that a person's right to be transferred within a reasonable time of a CAP order was clearly established law at the time of these violations. First, in *Slone v. Herman*, the plaintiff-prison inmate argued that several probation, parole board, and corrections-department officials violated his constitutional rights by not releasing him until eight months after the sentencing order granting release became final and nonappealable. 983 F.2d 107, 108-09 (8th Cir. 1993). The Eighth Circuit held that prison officials who fail to release an inmate after a court order suspending the inmate's sentence becomes final and nonappealable are not protected by qualified immunity, reasoning that once the order "became final and nonappealable, the state lost its lawful authority to hold Slone." *Id.* at 110.

Second, in *Walters v. Grossheim*, a federal district court ordered officials to transfer a prison inmate to a less-restrictive setting, from a Level III setting to a Level IV setting. 990 F.2d 381, 384 (8th Cir. 1993). The district court did not stay the resulting judgment.

State officials requested that the judgment be set aside and refused to transfer the inmate for over two months. *Id.* at 383. The Eighth Circuit concluded that the officials' failure to comply with an unstayed judgment violated clearly established law and that therefore, the officials were not protected by qualified immunity. *Id.* at 384. "Any reasonably competent official must know that unless a judgment has been stayed, it must be obeyed." *Id*.

There are key differences between this case and the federal criminal cases on which appellants rely. First, *Slone* is distinguishable because the state officials no longer had authority to hold the incarcerated person, whereas here, respondents retained the authority to hold appellants. Second, *Walters* is distinguishable because the officials moved to set aside the order granting the transfer and refused to transfer Walters pending the decision on the motion despite an unstayed order. Here, respondents did not appeal the CAP order or otherwise indicate *refusal* to transfer appellants.

Appellants assert that *Slone* and *Walters* stand for the broad proposition that "once an order is effective and final it cannot be disregarded by officials." But as noted above, a clearly established right focuses on the *particular* conduct, not a broad, general proposition. *Mullenix*, 577 U.S. at 12, 136 S. Ct. at 308. The parties do not cite to, nor are we aware of, any precedential authority clearly establishing a constitutional or statutory right for a civilly committed sex offender to be transferred to CPS within a reasonable time of a final CAP order. *See Simmons v. Fabian*, 743 N.W.2d 281, 290 n.5 (Minn. App. 2007) (noting that federal opinions on qualified immunity in section 1983 cases are persuasive, but only decisions of Minnesota Supreme Court and United States Supreme Court are binding on this court).

Moreover, our caselaw recognizes differences between the civil-commitment and criminal contexts, and this nonbinding federal caselaw in the criminal context did not place the statutory or constitutional question "beyond debate" at the time of the violations. *Ashcroft*, 563 U.S. at 741, 131 S. Ct. at 2083; *see In re Linehan*, 594 N.W.2d 867, 871-72 (Minn. 1999) (noting that civil commitment in context of Minnesota Sexually Dangerous Person Act differs fundamentally from criminal confinement because it does not share two primary objectives: punishment and deterrence); *see also Kansas v. Hendricks*, 521 U.S. 346, 347, 117 S. Ct. 2072, 2075 (1997) (holding that civil confinement does not violate Double Jeopardy clause because it does not amount to a second prosecution or punishment for convicted offense); *see also In re Civil Commitment of Martin*, 661 N.W.2d 632 (Minn. App. 2003) ("Protections against double jeopardy are not implicated by the [sexually dangerous person] Act, because the purpose of commitment under the [sexually dangerous person act] is treatment and not punishment"), *review denied* (Minn. Aug. 5, 2003). "[T]he procedural protections afforded in a criminal commitment surpass those in a civil commitment." *Foucha v. Louisiana*, 504 U.S. 71, 95, 112 S. Ct. 1780, 1793 (1992) (Kennedy, J., dissenting) (citing *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043 (1983)). Thus, nonbinding federal caselaw in the criminal context did not place the statutory or constitutional question in this case "beyond debate" at the time of the alleged violations.

As to the applicable state law, we note that the statutes governing transfers of civilly committed sex offenders to CPS do not articulate *when* an official must implement a CAP order granting transfer. *See* Minn. Stat. § 253B.19, subd. 3 (2020) (stating that CAP order

becomes effective no sooner than 15 days after issuance but providing no deadline for implementation). We also note that the parties do not cite to, nor are we aware of, any precedential or even nonprecedential authority discussing a civilly committed sex offender's right to transfer to CPS within a reasonable time of a final CAP order granting transfer. Finally, we observe that the CAP orders here, like the statutes governing transfer to CPS, were silent on *when* respondents must transfer appellants to CPS. The CAP orders here merely state that transfer "is appropriate" and that the judgment is stayed for 15 days.

Under the particular facts of this case, absent clear guidance from statutory authority or precedential caselaw, we are not convinced that *Slone*, *Walters*, or any other authority clearly established a civilly committed sex offender's right to be transferred to CPS within a "reasonable time" of a final CAP order at the time of these alleged violations.[2] The applicability of nonprecedential federal criminal caselaw in this civil-commitment context was not so clearly established at the time of the alleged violations such that a reasonable official would have known that the delay in transferring appellants was unlawful. *Ashcroft*, 563 U.S. at 741, 131 S. Ct. at 2083. Respondents are therefore entitled to qualified immunity.

Affirmed.

[2] We reach this conclusion, nevertheless, with significant concern about the delays of these transfers and the challenges to effecting timely transfer to CPS.