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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2410**

Odell Depriest Crawford,
Appellant,

vs.

Joan Fabian,
Commissioner of Corrections,
Respondent.

**Filed November 10, 2008
Affirmed
Peterson, Judge**

Washington County District Court
File No. CX-06-4439

Odell DePriest Crawford, OID #207607, MCF - Moose Lake, 1000 Lakeshore Drive,
Moose Lake, MN 55767 (pro se appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, 900
Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from an order denying habeas corpus relief, appellant Odell DePriest
Crawford argues that his Fifth Amendment privilege against self-incrimination was

violated by the extension of incarceration time as a disciplinary sanction for appellant's refusal to discuss his crime of conviction during an interview for placement in a sex-offender treatment program. Because appellant has failed to show any likelihood of a successful collateral attack on his conviction, the Fifth Amendment privilege no longer applied, and we affirm.

FACTS

In 2001, appellant was found guilty of first-degree criminal sexual conduct and sentenced to 144 months in prison. Respondent Commissioner of Corrections determined that appellant did not meet the criteria for review by the sex-offender-program referral committee and deferred making a recommendation regarding sex-offender treatment for appellant. This court affirmed appellant's conviction on direct appeal and also affirmed the denial of postconviction relief. *State v. Crawford*, 2002 WL 31056664 (Minn. App. Sept. 17, 2002), *review denied* (Minn. Dec. 17, 2002); *Crawford v. State*, 2004 WL 193179 (Minn. App. Feb. 3, 2004), *review denied* (Minn. Apr. 20, 2004).

In July and August 2005, the federal district court denied appellant's request for habeas corpus relief and refused to certify for appeal the issues raised by appellant. *Crawford v. Minnesota*, 2005 WL 1593038 (D. Minn. 2005); *Crawford v. Minnesota*, 2005 WL 1843329 (D. Minn. 2005). Appellant appealed to the Eighth Circuit Court of Appeals, which denied the appeal in August 2007. *Crawford v. Minnesota*, 498 F.3d 851 (8th Cir. 2007).

In December 2005, while the appeal was pending before the Eighth Circuit, respondent interviewed appellant for placement in a sex-offender treatment program.

Appellant refused to discuss his offense of conviction due to the pending federal appeal. In February 2006, respondent determined that appellant had made himself unamenable to sex-offender treatment by refusing to discuss his offense, thereby violating a disciplinary regulation. As a sanction for violating the regulation, respondent extended appellant's incarceration by 45 days.

Appellant filed this habeas corpus petition, arguing that respondent violated his Fifth Amendment privilege against self-incrimination by imposing the sanction when his federal habeas proceeding was still pending. The district court denied the petition. This appeal followed.

D E C I S I O N

A writ of habeas corpus is a statutory civil remedy available “to obtain relief from imprisonment or restraint.” Minn. Stat. § 589.01 (2006). “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). This court gives “great weight to the [district] court's findings in considering a petition for a writ of habeas corpus and will uphold the findings if they are reasonably supported by the evidence.” *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). But questions of law are reviewed de novo. *State ex rel. McMaster v. Benson*, 495 N.W.2d 613, 614 (Minn. App. 1993), *review denied* (Minn. Mar. 11, 1993).

The supreme court has held that an inmate has a Fifth Amendment privilege while his conviction is on appeal that protects the inmate from being sanctioned for refusing to discuss the offense of conviction in a prison treatment program. *Johnson v. Fabian*, 735 N.W.2d 295, 310 (Minn. 2007). The supreme court has also held that the privilege continues as long as there is a “real and appreciable risk” that the inmate’s statement could be used in a perjury prosecution. *Id.* at 312.

Appellant’s trial occurred in 2001, and the statute of limitations for perjury is three years. Minn. Stat. § 628.26(k) (2006). Thus, appellant was not subject to a perjury prosecution when he refused to answer questions in December 2005.

The remaining question is whether the Fifth Amendment privilege extends beyond when a conviction becomes final, a question that the supreme court declined to answer in *Johnson*.¹ *See id.* at 311 n.6 (noting that it was unnecessary to address status of Fifth Amendment privilege when inmate has collateral attack pending or is contemplating one).

In *State Ex Rel. Henderson v. Fabian*, this court rejected the argument that an inmate retained a Fifth Amendment privilege not to discuss his offense, when he was interviewed in 2003 for placement in sex-offender treatment, after his direct appeal had already been decided, and he later, in 2004, filed a federal petition for habeas corpus

¹Appellant’s conviction became final in March 2003, more than two years before he invoked the privilege against self-incrimination. *See O’Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (stating that conviction is final when judgment of conviction has been entered, availability of appeal has been exhausted, and time to petition for certiorari has elapsed or petition is denied); *see also* Sup. Ct. R. 13 (providing 90 days from entry of state court judgment to petition for certiorari review).

relief and was also contemplating a state postconviction petition. 715 N.W.2d 128, 129, 131 (Minn. App. 2006), *rev'd on other grounds sub nom. Johnson v. Fabian*, 735 N.W.2d 295 (Minn. 2007). This court explained that extending the Fifth Amendment privilege to the period of collateral review would extend the privilege almost indefinitely, although the court noted that “cases may arise in which a fundamental injustice occurs that only can be addressed in a collateral review.” *Id.* at 131-32. This court concluded that the inmate’s “bald assertion of claims in an appeal” was “too attenuated to overcome the state’s strong interest in treating sex offenders and having finality in the criminal process so that inmates can be required to participate in the designated treatment program.” *Id.* at 132.

Here, the extended incarceration time was imposed after appellant’s conviction became final and he had been denied postconviction relief and while his appeal in the federal habeas proceeding was pending. Under *Henderson*, absent a fundamental injustice, the Fifth Amendment privilege no longer applied when appellant was interviewed in December 2005.

Based on newly discovered DNA evidence that could be used to collaterally attack his conviction, appellant argues that his case presents a real and appreciable risk of incrimination. Correspondence between appellant and two attorneys indicates that while the Bureau of Criminal Apprehension (BCA) was processing evidence in more than one case in April 2001, appellant’s DNA sample was erroneously injected into a sample from a case in which appellant was not a suspect, which created a match between appellant and the other case, and that if counsel had known about this error at the time of appellant’s

trial, it could have affected trial strategy. But this correspondence does not indicate that there was any error with respect to DNA evidence in appellant's case, and although it is possible that the BCA made a mistake in appellant's case, the newly discovered evidence is insufficient to show any appreciable likelihood that the DNA evidence in appellant's trial was tainted and that a collateral attack on appellant's conviction will be successful. Accordingly, there is no fundamental injustice in not applying the Fifth Amendment privilege, and the district court did not err in denying appellant's petition for habeas corpus relief.

Because the district court properly denied habeas relief on this ground, we need not decide the retroactivity issue raised by respondent.

Affirmed.