STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1307

Rico Gamble, petitioner,
Appellant,

vs.

State of Minnesota, Department of Human Services, et al.,
Respondents.

Filed February 15, 2011
Affirmed
Toussaint, Judge

Carlton County District Court
File No. 09-CV-10-255

Rico Tremaine Gamble, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

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

TOUSSAINT, Judge

Rico Gamble appeals from the district court's denial of his petition for a writ of habeas corpus seeking release from the Minnesota Sex Offender Program (MSOP), challenging the constitutionality of the commitment statutes, the conditions of

confinement at MSOP, and the procedures utilized in his original commitment and his continued commitment. We affirm.

D E C I S I O N

"Committed persons may challenge the legality of their commitment through habeas corpus. But the only issues the district court will consider are constitutional and jurisdictional challenges." *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999) (*Joelson III*) (citations omitted), *review denied* (Minn. July 28, 1999). A petitioner must set forth sufficient facts in his petition to establish a prima facie case for habeas relief. *State ex rel. Fife v. Tahash*, 261 Minn. 270, 271, 111 N.W.2d 619, 620 (1961). A petitioner may not use habeas proceedings to obtain review of an issue previously raised, to substitute for an appeal, or to collaterally attack a judgment. *Joelson III*, 594 N.W.2d at 908. When, as in this case, the facts are undisputed, we review an order denying habeas relief de novo. *Id*.

Appellant raises multiple arguments on appeal. These arguments are best split into five categories: (1) challenges to the constitutionality of the commitment statutes, (2) challenges to the sufficiency of the evidence at the commitment proceeding, (3) appellant's ineffective-assistance-of-counsel claim, (4) appellant's argument that he does not receive adequate treatment, and (5) challenges to the constitutionality of the terms of appellant's supervised release. We address each category in turn.

I.

The constitutionality of a statute is a question of law, which we review de novo. *State v. Wright*, 588 N.W.2d 166, 168 (Minn. App. 1998), *review denied* (Minn. Feb. 24,

1999). Minnesota statutes are presumed to be constitutional, and a court's power to declare a statute unconstitutional "should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging a statute must demonstrate beyond a reasonable doubt that the statute is unconstitutional. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998).

Appellant makes several arguments challenging the constitutionality of the commitment statutes, alleging that the statutes violate substantive and procedural due process, equal protection, and his Eighth Amendment protection from cruel and unusual punishment. The district court rejected each of these claims.

Appellant's first argument is that his commitment under the statutes violates due process because the statutes are punitive in nature. But the supreme court has repeatedly rejected the argument that civil commitment of sexually dangerous persons and sexual psychopathic personalities is punitive. Rather, civil commitment is remedial, with the primary goal being treatment rather than detention. *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995). This court is bound by established supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). Because the supreme court has previously rejected the argument that the commitment statutes are punitive in nature, appellant's arguments to the contrary are unavailing.

Appellant also argues that the civil commitment statutes' requirement of clear and convincing evidence—as opposed to proof beyond a reasonable doubt—in a commitment proceeding violates procedural due process. But this argument has also been rejected by the Minnesota courts. *See In re Joelson*, 344 N.W.2d 613, 614 (Minn. 1984) (*Joelson I*)

(holding that where the record indicates that there is clear and convincing evidence that a person is a psychopathic personality within the meaning of the commitment statute, "[n]o further evidence to support [such a finding] is necessary"). Appellant's argument that due process requires proof beyond a reasonable doubt is therefore unavailing.

Appellant next argues that civil commitment under Minn. Stat. § 253B.185 (2010) violates equal protection because the statute "places more burdens on the persons committed [as sexually dangerous persons or sexual psychopathic personalities] than those committed mentally ill, developmental disability [sic] or chemically dependent." Because civil commitment of sexual predators threatens individual liberty, heightened scrutiny is required in an examination of Minn. Stat. § 253B.185. *In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994); *see also In re Linehan*, 557 N.W.2d 171, 186 (Minn. 1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999) (*Linehan IV*). Under this heightened level of scrutiny, the Minnesota Supreme Court has concluded that civil commitment of sexual predators under Minn. Stat. § 253B.185 does not violate the right to equal protection. *Linehan III*, 557 N.W.2d at 186-87 (addressing commitment of sexually dangerous persons); *Blodgett*, 510 N.W.2d at 916-17 (addressing commitment of psychopathic personalities). The court concluded that, in cases dealing with sex offenders, "the compelling government interest is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault." *Blodgett*, 510 N.W.2d at 914. Because Minn. Stat. § 253B.185 passes the heightened-scrutiny standard of review, appellant's equal-protection claim is without merit.

Appellant also argues that his commitment under the statute violates his Eighth Amendment protections against cruel and unusual punishment. As support for this assertion, appellant argues that there is no hope for possible release from MSOP because no patient has ever been released by MSOP, and his confinement may therefore "be categorized as a death sentence since the only persons committed as [sexually dangerous persons] that have been released have done so through [d]eath."

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. U.S. Const. amend. VIII. Commitment under the statutes therefore cannot constitute cruel and unusual punishment, as its purpose is not punitive, but rather treatment and protection of the public. *Blodgett*, 510 N.W.2d at 916; *see also Lausche v. Comm'r of Pub. Welfare*, 302 Minn. 65, 70, 225 N.W.2d 366, 369 (1974) (commitment to public institution not a penalty). Appellant's claim that his commitment violates his Eighth Amendment protections is therefore unavailing.

Because appellant fails to demonstrate beyond a reasonable doubt that the commitment statutes are unconstitutional, he has not carried his burden on the issue. The district court therefore did not err by denying his petition for a writ of habeas corpus on this basis.

II.

Appellant challenges the sufficiency of the evidence at his commitment hearing, arguing that because the actuarial methods used by mental health professionals are allegedly incorrect "in two out of every three cases," such evidence is insufficient to establish the criteria for commitment by clear and convincing evidence. *See* Minn. Stat.

§§ 253B.18, subd. 1(a) ("If the court finds by clear and convincing evidence that the proposed patient is a person who is mentally ill and dangerous to the public, it shall commit the person to a secure treatment facility or to a treatment facility willing to accept the patient under commitment."), .185, subd. 1(a) ("[T]he provisions of [chapter 253B] pertaining to persons who are mentally ill and dangerous to the public apply with like force and effect to persons who are alleged or found to be sexually dangerous persons or persons with a sexual psychopathic personality.") (2010).

But such an assertion is not properly raised in a habeas proceeding. *See Joelson III*, 594 N.W.2d at 908 (stating that a district court may only consider jurisdictional and constitutional challenges in a habeas proceeding). Because a challenge to the sufficiency of the evidence at appellant's commitment trial could have been raised on direct appeal, the district court did not err by denying appellant's habeas petition on this ground.[1] *See id.* (stating a petitioner may not use habeas proceedings to obtain review of an issue previously raised, substitute for an appeal, or collaterally attack a judgment).

Moreover, appellant's assertion that opinions of mental health experts are insufficient to satisfy the clear-and-convincing-evidence standard has been rejected by the supreme court. *Blodgett*, 510 N.W.2d at 917 n.15 ("[T]he opinions of mental health experts are sufficiently reliable to support commitment proceedings.") (citing *Foucha v. Louisiana*, 504 U.S. 71, 76 n.3, 112 S. Ct. 1780, 1783 n.3 (1992)). Therefore, even if appellant's insufficient-evidence claim was properly raised in his petition, the district

[1] Appellant filed a direct appeal from the district court's indeterminate commitment order, but we dismissed the appeal after appellant failed to provide this court with a transcript. *In re Commitment of Gamble*, No. A08-503 (Minn. App. April 30, 2008) (order).

court did not err by denying appellant's requested relief on that basis.

III.

Appellant asserts that the district court erred by denying his habeas petition because he received ineffective assistance of counsel at his commitment trial. He bases his claim on his assertions that his counsel at the commitment proceeding (1) failed to investigate the reliability of the expert witnesses, (2) refused to assist appellant in the direct appeal, (3) refused to cross-examine witnesses, and (4) "failed to allow [appellant] to choose an examiner."

Minnesota law recognizes that persons facing civil commitment are entitled to competent counsel, and the legislature has instructed that in any proceeding under chapter 253B the "court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel." Minn. Stat. § 253B.07, subd. 2c (2010). But it is unclear whether an ineffective-assistance-of-counsel claim may be raised in a habeas petition in a civil-commitment context. Rather, the claim of ineffective assistance of counsel is more properly raised in a direct appeal or a timely motion for a new trial. We are aware of no caselaw in which an ineffective-assistance-of-counsel claim was considered in a habeas corpus action in the civil-commitment context.

Appellant could have raised his claim in a direct appeal or a timely motion for a new trial, but he failed to do so. Moreover, a district court may only consider jurisdictional and constitutional challenges in a habeas proceeding. *Joelson III*, 594 N.W.2d at 908. Because civil commitment is not a criminal proceeding, appellant's right to counsel is statutory—not constitutional. *Compare* U.S. Const. amend. VI (providing

right to counsel in criminal cases), *with* Minn. Stat. § 253B.07, subd. 2c (providing right to counsel in civil-commitment proceedings). We therefore hold that the district court did not err by concluding that appellant's ineffective-assistance claim "is not properly addressed in this habeas proceeding."

Appellant argues that the Supreme Court's holding in *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690 (2003), allows for an ineffective-assistance-of-counsel claim to be raised in a collateral proceeding under 28 U.S.C. § 2255 (Supp. 2009)—the federal habeas corpus statute—even when the claim could have been raised on direct appeal. 538 U.S. at 504, 123 S. Ct. at 1694. But *Massaro* is distinguishable in two respects. First, appellant's habeas petition was brought under the Minnesota habeas statute—Minn. Stat. § 589.01 (2010)—rather than its federal counterpart. Second, the petition in *Massaro* alleged ineffective assistance of counsel in a criminal proceeding. *Id.* at 502, 123 S. Ct. at 1692. Therefore, the petitioner in *Massaro* was asserting a violation of a constitutional—rather than a statutory—right to counsel. *See* U.S. Const. amend. VI (providing right to counsel in criminal cases); Minn. Stat. § 253B.07, subd. 2c (providing right to counsel in civil-commitment proceedings). The Supreme Court's holding in *Massaro* therefore does not compel the conclusion that a petitioner may allege ineffective assistance of counsel in a habeas proceeding challenging his civil commitment under chapter 253B.

Even if appellant's ineffective-assistance-of-counsel claim was properly raised in a habeas proceeding, it nonetheless fails on the merits. In criminal cases, "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental

right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 2063 (1984). Skillful and knowledgeable counsel is necessary to the American judicial system as it provides criminal defendants the "opportunity to meet the case of the prosecution to which they are entitled," and the Sixth Amendment right to counsel is therefore a right to the effective assistance of counsel. *Id.* at 685-86, 104 S. Ct. at 2063 (quotation omitted). By analogy, this court has applied this standard when evaluating the adequacy of counsel in civil-commitment cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

Counsel deprives a client of this right by failing to render "adequate legal assistance." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064 (quotation omitted). To establish a claim of ineffective assistance of counsel, a defendant must make two showings by a preponderance of the evidence: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 688, 104 S. Ct. at 2068; *see also Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (adopting the *Strickland* test in Minnesota). The second prong of the *Strickland* test requires a showing "that counsel's errors were so serious as to [have deprived] the defendant of a fair trial, a trial whose result [was] reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

The proper standard for attorney performance, as it relates to the first prong of the *Strickland* test, is "reasonably effective assistance." *Id.* Counsel provides ineffective assistance when the representation falls below "an objective standard of reasonableness."

Id. at 688, 104 S. Ct. at 2064. While *Strickland* does not concretely define reasonableness, the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* The Minnesota standard for attorney competence is "representation by an attorney exercising the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). The proper standard for prejudice, as it relates to the second prong of the *Strickland* test, is that appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* To succeed on his ineffective-assistance claim, appellant must therefore show that his counsel at the commitment hearing failed to exercise the customary skills and diligence of a reasonably competent attorney and that the outcome of the trial would have been different but for the alleged deficiency.

Appellant points to a number of alleged deficiencies in his commitment-trial counsel's performance, ranging from failure to cross-examine or call witnesses to not assisting appellant with his direct appeal. But none of the alleged deficiencies are sufficient to support an ineffective-assistance-of-counsel claim. First, appellant failed to file a transcript documenting the alleged failure to call witnesses or challenge the evidence presented. The burden of providing a transcript rested solely on appellant. *See* Minn. R. Civ. App. P. 110.02, subd. 1 (stating it is an appellant's responsibility to order a

transcript); *Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn. App. 1990) (holding that an appellant is not relieved of the duty of creating and preserving an adequate record simply because he or she is acting pro se), *review denied* (Minn. Apr. 13, 1990). Second, a number of the alleged deficiencies relate to matters of trial strategy, including whether to call witnesses and what information to present to the district court. Such matters generally rest within the discretion of trial counsel and therefore cannot form the basis for an ineffective-assistance claim. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Third, an attorney is not required to file an appeal from a commitment proceeding if, in the opinion of the attorney, there is an insufficient basis for proceeding. Minn. Spec. R. Commit. & Treat. Act 9. As discussed herein, the legal arguments appellant suggests should have been made are without merit. We therefore disagree with appellant's contention that trial counsel's alleged failure to raise them rendered his performance deficient.

Appellant's ineffective-assistance-of-counsel claim is without merit. Therefore, any error that the district court may have made by not considering the merits of the claim is harmless, and reversal is not required. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (holding that a correct decision will not be reversed "simply because it is based on incorrect reasons").

IV.

Appellant argues that MSOP "does not provide constitutionally adequate treatment," and his commitment is therefore unconstitutional. As support for his arguments, appellant rests on his assertion that the program "focuses on the criminal

attitudes and convict thinking associated with prison confinement" rather than specific treatment for sex offenders. Appellant also makes vague allegations that MSOP staff "retaliate against" committed persons who "exercis[e] their legal rights," and that "[m]any patients . . . go decades without any reviews because they have no legal representation and have been programmed to not challenge the treatment program."

As an initial note, a habeas proceeding is an improper means to raise a challenge to the adequacy of a patient's treatment. *See In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) ("The treatment of [committed] patients is properly raised before a hospital review board and not before the committing court."). Appellant's challenges to the legitimacy and adequacy of his treatment would therefore more properly be addressed to the special review board rather than the district court.

In the interests of justice, however, we will address appellant's assertion that he receives constitutionally inadequate treatment. *See* Minn. R. Civ. App. P. 103.04 (stating that this court "may review any other matter as the interest of justice may require"). The primary basis of appellant's challenge to his treatment is that the program "focuses on the criminal attitudes and convict thinking associated with prison confinement" rather than specific treatment for sex offenders. The facts of the current case are analogous to those of *In re Joelson*, 385 N.W.2d 810 (Minn. 1986) (*Joelson II*). In *Joelson II*, an individual diagnosed as suffering from pedophilia with an antisocial personality was committed as a psychopathic personality. 385 N.W.2d at 810. The individual was receiving treatment in the Social Adaptation Community Program, which was not designed to treat pedophilia directly but nonetheless addressed his lack of social skills. *Id.* at 811. The supreme

court, in addressing Joelson's claim that the treatment was inadequate, concluded:

> While it is apparent that the [Social Adaptation Community] Program will not "cure" Joelson so that he can fully function in society, it is treatment which satisfies his statutory right to treatment and any constitutional right he may have to adequate treatment. The . . . Program affords Joelson the opportunity to improve his mental condition.

Id. (footnote omitted). Just as in *Joelson II*, the treatment appellant is receiving satisfies appellant's statutory right to treatment and any constitutional right he may have to adequate treatment.[2] The district court therefore did not err by rejecting appellant's claims that he was receiving inadequate treatment.

V.

Appellant's final argument on appeal is that the conditions of his supervised release are unconstitutional. The basis for his argument is that his supervised release agreement requires him to successfully complete the MSOP and because "[n]o person in the past 20 years has ever completed the MSOP . . . such a condition is unconstitutional as it can never be satisfied and subjects [appellant] to punishment by violation and return to the [department of corrections]."[3]

---

[2] "A person receiving services under [chapter 253B] has the right to receive proper care and treatment, best adapted, according to contemporary professional standards, to rendering further supervision unnecessary." Minn. Stat. § 253B.03, subd. 7 (2010).

[3] Appellant also asserts that violations of MSOP rules are mere "technical violations" that are insufficient to justify a return to prison and that the conditions of his supervised release violate double jeopardy. But appellant's basis for his challenge to the terms of his supervised release to the district court was limited to his assertion that completion of treatment was impossible and because the MSOP is not accredited, even successful completion of the program "would not be recognized by a court of law or the professional psychological community." To the extent that appellant raises a new theory on appeal, his arguments are not properly before this court, and we do not consider them. *See Thiele*

In Minnesota, "every inmate shall serve a supervised release term upon completion of the inmate's term of imprisonment and any disciplinary confinement period imposed by the commissioner." Minn. Stat. § 244.05, subd. 1b(a) (2010). A person on supervised release remains in the state's legal custody and is subject to reincarceration for breach of a condition of release. Minn. Stat. § 243.05, subd. 1(b) (2010); *State v. Schwartz*, 628 N.W.2d 134, 139 (Minn. 2001).

An inmate may also be placed on "intensive supervised release." Minn. Stat. § 244.05, subd. 6 (2010). "The commissioner may order that an inmate be placed on intensive supervised release for all or part of the inmate's supervised release or parole term if the commissioner determines that the action will further the goals described in section 244.14, subdivision 1, clauses (2), (3), and (4)." *Id.*, subd. 6(a). The legislature has allowed the commissioner to "impose appropriate conditions of release on the inmate including but not limited to . . . treatment requirements." *Id.*, subd. 6(b). "In addition, any sex offender placed on intensive supervised release may be ordered to participate in an appropriate sex offender program as a condition of release." *Id.*

Minn. Stat. § 244.14, subd. 1(2) (2010) states the following goal: "to protect the safety of the public." Thus, the commissioner of corrections had authority to place appellant on intensive supervised release in order to ensure public safety. Minn. Stat. § 244.05, subd. 6 (citing Minn. Stat. § 244.14, subd. 1(2)). The commissioner also had authority to impose appropriate conditions of release—including treatment—and was specifically authorized to order appellant to participate in an appropriate sex-offender

---

v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court generally will only consider issues that were presented to and considered by the district court).

program as a condition of release because appellant meets the department of corrections' definition of a sex offender.[4] *Id.* Therefore, successful completion of sex-offender treatment was an appropriate term of appellant's supervised release.

Appellant asserts, however, that because nobody has "successfully completed" the treatment at MSOP, the term has become unconstitutional. This argument is essentially a variation on appellant's due-process challenge to the commitment statute itself, and has been rejected by the courts. *See, e.g. Blodgett*, 510 N.W.2d at 916 (rejecting the argument that "a psychopathic personality condition is untreatable" and stating that "it is not clear that treatment for the psychopathic personality never works"). Because the basis for appellant's argument is without merit, the district court did not err by denying his request for habeas relief.

Affirmed.

[4] DOC Division Directive 203.013 defines a "sex offender" as "an offender who is subject to predatory offender registration, or has a prior charge or conviction for an offense that was sex related." *Roth v. Comm'r of Corrections*, 759 N.W.2d 224, 228 (Minn. App. 2008) (citing DOC Div. Directive 203.013). The term "sex offender" is purely an internal prison label, as opposed to the designation "predatory offender," which remains applicable to a defendant after the completion of his term of incarceration.