STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0177

Joe Henry Bandy-Bey, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed June 17, 2008
Affirmed
Toussaint, Chief Judge

Carlton County District Court
File No. 09-CV-07-2053

Joe Henry Bandy-Bey, OID 125257, MCF Lino Lakes, 7525 Fourth Avenue, Lino Lakes, MN 55014 (pro se appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, 445 Minnesota Street., Suite 900, St. Paul, MN 55101-2127 (for respondent)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Johnson, Judge.

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

TOUSSAINT, Chief Judge

This expedited appeal is from an order denying appellant Joe Henry Bandy-Bey's petition for a writ of habeas corpus. That petition challenged a decision by respondent

Joan Fabian, Commissioner of Corrections, to impose sanctions for appellant's failure to complete mandated treatment. Because appellant no longer had a Fifth Amendment privilege to refuse to answer questions about his offense in the treatment program and because his other claims lack merit, we affirm.

FACTS

Appellant was convicted in 1999 of third-degree criminal sexual conduct and depriving another of parental rights. He was sentenced to 176 months and 34 months, respectively, for the two offenses. This court affirmed the conviction and sentence on direct appeal, as well as the denial of appellant's second petition for postconviction relief. *State v. Bandy*, No. C9-99-1371 (Minn. App. May 23, 2000), *review denied* (Minn. July 25, 2000); *Bandy v. State*, No. A04-850 (Minn. App. Nov. 9, 2004), *review denied* (Minn. Feb. 23, 2005).

In June 2006, during an interview for placement in the sex-offender treatment program (SOTP) in MCF-Lino Lakes, appellant denied that he had committed the offenses for which he was serving his sentences. In December 2006, appellant was interviewed at the SOTP in MCF-Moose Lake and again denied the offenses. These two treatment failures were considered to be disciplinary violations under Offender Disciplinary Regulation 510. As a result, the department of corrections (DOC) extended appellant's incarceration time by a total of 495 days. Appellant thereafter filed this petition for a writ of habeas corpus challenging the additional incarceration time imposed on him as a sanction for failing treatment.

The district court denied appellant's petition, concluding that appellant was properly ordered to undergo treatment, that his due-process rights were not violated, and that the DOC had the authority to impose disciplinary sanctions for his treatment failures. The court then concluded that, because appellant had not shown there was a "real and appreciable risk of incrimination," he did not have a Fifth Amendment privilege to refuse to discuss his offenses for treatment purposes.

D E C I S I O N

The district court's findings when ruling on a petition for habeas corpus are entitled to great weight and will be upheld if reasonably supported by the evidence. *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). Questions of law, however, are subject to de novo review. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

Appellant argues that the disciplinary sanction imposed on him violated his Fifth Amendment privilege not to be compelled to answer questions in the treatment program that might incriminate him. He also argues that the DOC lacked authority to order him to complete treatment, that the disciplinary procedure denied him due process, and that the disciplinary sanction violated the separation-of-powers doctrine.

Fifth Amendment Privilege

In *Johnson v. Fabian*, 711 N.W.2d 540 (Minn. App. 2006), this court held that an inmate has a Fifth Amendment privilege while his conviction is on appeal that protects him from being sanctioned for refusal to discuss the offense of conviction in a prison

treatment program. Two months later, this court held that, after the right to direct appeal has been exhausted, an inmate generally loses that privilege despite the availability to him of a collateral attack upon the conviction. *State ex rel. Henderson v. Fabian*, 715 N.W.2d 128 (Minn. App. 2006). The supreme court granted further review in both cases, consolidated them, and issued an opinion affirming the *Johnson* holding that the Fifth Amendment privilege continues during the pendency of direct appeal. *Johnson v. Fabian*, 735 N.W.2d 295, 310 (Minn. 2007). But the court reversed *Henderson* and 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. The court explained that it did not need to address the status of the Fifth Amendment privilege when the inmate has a collateral attack pending or is contemplating one. *Id*. at 311 n.6.

Appellant's direct appeal was decided in 2000. Appellant's trial, at which he apparently testified, occurred in 1999, and the statute of limitations for perjury is three years. Minn. Stat. § 628.26(k) (2000). Appellant thus did not have a "real and appreciable risk" of a perjury prosecution in 2006 when he denied committing his offenses in response to the SOTP questions.

In September 2002, appellant filed a postconviction petition, which was denied. A second petition was filed in March 2004, and its denial was affirmed by this court in 2004, with the supreme court denying review in February 2005. Appellant filed a federal habeas petition in July 2005, and, at the time he was questioned by the SOTP at Lino Lakes in June 2006, appellant had a motion for reconsideration of that petition pending in federal district court. In December 2006, when he refused to answer the SOTP questions

at Moose Lake, appellant had a petition pending in the Eighth Circuit Court of Appeals for permission to file a successive habeas petition.

Appellant cites no decisions recognizing a Fifth Amendment privilege to refuse to answer questions in treatment when both a direct appeal and a postconviction challenge have been decided and there is no longer a possibility of a perjury prosecution.

The DOC argues that this court should adopt the position that the Fifth Amendment privilege no longer applies when the direct appeal has been decided and the inmate's perjury exposure has ended and the only ground to claim the privilege is collateral review.

The department has cited a large number of cases from other jurisdictions. But few appear to deal with this issue in the context of in-prison treatment programs and the admissions they frequently require. In *United States v. Duchi*, 944 F.2d 391, 394 (8th Cir. 1991), the Eighth Circuit held that the "better rule" is that the Fifth Amendment privilege extends only until the direct appeal is decided (by affirmance) or the time for direct appeal has expired; but *Duchi* does not involve the in-prison treatment context that is at issue here. Similarly, two of the cases the DOC acknowledges as supporting a longer life for the privilege involve much different contexts than this appeal. *See, e.g.*, *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (holding, in case in which court asked defendant for admission of guilt before sentencing him, that privilege extends so long as perjury charge is possible); *People v. Edgeston*, 623 N.E.2d 329, 339-40 (Ill. 1993) (holding that witness at defendant's trial who had pleaded guilty in another case in exchange for dismissal of charges related to charges against defendant had Fifth

Amendment privilege because he intended to collaterally attack his plea, which would open up the dismissed charge in current file). Both *Thomas* and *Edgeston*, based on their unique facts, appear to have little application to the *temporal* duration of the privilege once the direct appeal has been decided. Finally, the Wisconsin case cited as applying an intermediate standard ("appreciable chance of success" on collateral review) also involves a witness at trial, not an inmate being questioned in the prison treatment context. *See State v. Marks*, 533 N.W.2d 730, 735 (Wis. 1995) (holding that privilege extends to state's witness who could show "appreciable chance of success" on motion to modify sentence).

Because the facts of this case are very similar to those in *Henderson*, we need not decide the exact duration of the Fifth Amendment privilege following conviction. In *Henderson*, the defendant, after losing on direct appeal, filed a federal habeas petition "rais[ing] the same issues that had been the subject of" his direct appeal. 715 N.W.2d at 129. The federal district court denied the petition and refused to certify the case for appeal. *Id.* at 129-30. The Eighth Circuit dismissed his appeal. *Id.* at 130. This court held that, under those facts, the Fifth Amendment privilege no longer applied. *Id.* at 132.

Appellant also filed a federal habeas petition at some point in 2000, apparently after his direct appeal was decided. He later filed a second habeas petition in 2005, which was also denied. Although appellant failed to timely object to that denial, he had a motion for reconsideration pending at the time that he was initially interviewed by the SOTP in June 2006. Like the offender in *Henderson*, who was denied certification to appeal, appellant was denied certification to file a subsequent petition. Unlike the

offender in *Henderson*, appellant had already had two state postconviction proceedings before his initial interview for the SOTP. Thus, appellant's claim to the survival of the Fifth Amendment privilege is even weaker than that of the offender in *Henderson*.

Based on this procedural history, appellant can show even less of a likelihood of success, or a "manifest injustice" waiting to be remedied, as expressed in this court's *Henderson* opinion, than the offender in *Henderson*. The supreme court granted review in *Henderson* and reversed based on the risk of a perjury prosecution, without addressing the effect of the pendency or possibility of collateral-review proceedings. 735 N.W.2d at 311. Because the supreme court did not reach that issue, or criticize this court's reasoning on the issue, we choose to follow that reasoning for purposes of consistency. Thus, even if Minnesota courts were ultimately to hold that the Fifth Amendment privilege extends into the period of collateral review, based on this court's *Henderson* opinion, appellant has not shown that the privilege would survive for him.

Ex Post Facto Clause

Appellant also argues that the disciplinary sanction was imposed against him in violation of the Ex Post Facto Clause because the 1999 statutory amendment allowing the DOC to mandate in-prison treatment became effective after appellant's April 1999 sentencing.

In *Rud v. Fabian*, 743 N.W.2d 295, 304 (Minn. App. 2007), *review denied* (Minn. Mar. 26, 2008), this court held that the 1999 amendment to Minn. Stat. § 244.03 allowing mandatory treatment could not be applied to an inmate who was sentenced in 1985. But as the DOC points out, a 1992 amendment to a different statute gave the DOC authority

to order inmates who committed offenses on or after August 1, 1993 to participate in treatment. *See* 1992 Minn. Laws ch. 571, art. 1, §1 (amending Minn. Stat. § 241.67, subd 3, deleting provision in that statute that participation in treatment is voluntary). Appellant, unlike the defendant in *Rud,* in which the 1992 amendment was not discussed, committed his offense after August 1, 1993. Therefore, the 1992 amendment could apply to him, and there was no violation of the Ex Post Facto Clause in requiring him to complete treatment under that provision.

Separation of Powers

Appellant also appears to argue that the DOC, in sanctioning him for failing to complete treatment, was either "prosecuting" him, thereby usurping an executive function, or extending his sentence, usurping a judicial function. But the statute provides that the DOC may discipline offenders, and extend their term of incarceration, for violating disciplinary rules. Minn. Stat. § 244.05, subd. 1b(b) (2006). This court has held that "prison discipline is not considered 'prosecution'" for double-jeopardy purposes. *State v. McKinney*, 575 N.W.2d 841, 844 (Minn. App. 1998). The DOC's authority over supervised release, and the revocation of it, does not infringe on the court's sentencing authority. *See State v. Schwartz,* 628 N.W.2d 134, 140-41 (Minn. 2001). Therefore, appellant has not shown any violation of the separation-of-powers doctrine.

Other Issues

Appellant also argues that the DOC's decision sanctioning him was arbitrary and capricious because he did not refuse treatment, that the decision relied on false information or misrepresentations, and that documents used in the decision to mandate

treatment were falsified. But despite his challenge to the factual basis for the finding that he failed treatment, appellant now asserts that he had a Fifth Amendment privilege not to answer questions in treatment. We note that the DOC in June 2006 removed the "public risk" designation that appellant claims was based on altered documents. Finally, there is no factual basis for appellant's other claims.

Because the district court's findings are supported by the evidence and because appellant has not shown that the disciplinary sanctions infringed on a Fifth Amendment privilege, we affirm.

Affirmed.