STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1195

Brad Ronald Stevens,
Appellant,

vs.

Cal R. Ludeman, Commissioner of Human Services,
Respondent.

Filed July 1, 2008
Affirmed
Stoneburner, Judge

Nicollet County District Court
File No. CV06423

Jill E. Clark, 2005 Aquila Avenue North, Golden Valley, MN 55427 (for appellant)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

STONEBURNER, Judge

Appellant, who is under an indeterminate commitment to the Minnesota Sex Offender Program as a sexually dangerous person, challenges the denial of his petition for a writ of habeas corpus. Appellant asserts that because sex-offender treatment will not be provided until he forfeits his Fifth Amendment right against self-incrimination,

and because there is insufficient evidence that he suffers from a mental disorder, his continued confinement is unconstitutional. We affirm.

FACTS

In April 2005, appellant Bradley Ronald Stevens was civilly committed as a sexually dangerous person (SDP) to the Minnesota Sex Offender Program (MSOP), operated by the Minnesota Department of Human Services at St. Peter and Moose Lake. Following a 60-day review hearing in July 2005, he was indeterminately committed. Stevens's direct appeal of his commitment was dismissed as untimely.

Stevens has declined to consent to treatment at MSOP, asserting that MSOP policies require him to incriminate himself by admitting uncharged criminal sexual conduct, and expose him to potential perjury charges by requiring information about charged criminal sexual conduct that conflicts with prior sworn testimony.

In June 2006, Stevens filed a 20-page pro se petition for a writ of habeas corpus in district court, challenging his continued confinement at MSOP on numerous grounds, including the unavailability of treatment. Respondent Commissioner of Human Services moved to dismiss the petition as procedurally barred and without merit. Stevens then obtained counsel to represent him in the writ proceeding. After a telephone hearing in which counsel argued the issues, and after Stevens's attorney filed additional briefing, the district court denied the petition. The district court concluded that Stevens's substantive due-process rights are not violated by his commitment, that Stevens is treatable but has refused treatment, and that, whether or not his postconviction motions in his criminal cases are resolved in his favor, he is still subject to valid civil commitment that is

justified by the state's legitimate and compelling interest in the safety of others. 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 [unlawful] imprisonment or restraint." Minn. Stat. § 589.01 (2006). "Committed persons may challenge the legality of their commitment through habeas corpus." *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999), *review denied* (Minn. July 28, 1999); *see also* Minn. Stat. § 253B.23, subd. 5 (2006) (stating that commitment statute not meant to abridge right to habeas corpus). But the scope of habeas is limited; it may not be used to address issues previously raised, as a substitute for appeal, or to collaterally attack a commitment. *Joelson*, 594 N.W.2d 908. Where another means is available to raise the claims, a habeas petition is properly dismissed. *Kelsey v. State*, 283 N.W.2d 892, 893-94 (Minn. 1979) (holding that a habeas action was properly dismissed where claims were raised in a direct appeal and through postconviction remedies).

"This court gives great weight to the district court's findings in considering a petition for habeas corpus and will uphold those findings if they are reasonably supported by the evidence." *State ex rel. Allen v. Fabian*, 658 N.W.2d 913, 915 (Minn. App. 2003). But this court reviews questions of law de novo. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

As an initial matter, the commissioner argues that Stevens is precluded from challenging the sufficiency of his mental-disorder diagnosis or claiming Fifth Amendment violations because he did not raise these issues in a direct appeal from his

commitment. The commissioner also asserts that any treatment issues are only properly raised before a hospital review board. *See In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) (stating that, in the context of an appeal from an order for commitment, "[t]he treatment of patients is properly raised before a hospital review board and not before the committing court"). But we conclude that, to the extent Stevens's challenges generally relate to claims of constitutionally invalid confinement or restraint, they are properly addressed in a writ of habeas corpus.

I. Fifth Amendment privilege

The district court committed Stevens indeterminately to MSOP based on its conclusions of law that Stevens meets the statutory requirements for SDP commitment and that "MSOP is the appropriate and least restrictive alternative available to provide confinement, care, and treatment to [Stevens]." On appeal, Stevens argues that treatment is not available *to him* because, in order to enter the treatment program, he is required to incriminate himself, and therefore his continued confinement is unconstitutional. Stevens relies on the supreme court's recent holding in *Johnson v. Fabian*, that the Minnesota Department of Corrections (DOC) cannot constitutionally extend an inmate's incarceration for failure to participate in sex-offender treatment that is not available unless the inmate waives his Fifth Amendment privilege against self-incrimination. 735 N.W.2d 295, 311-312 (Minn. 2007).

But as the court explains in *Johnson*, not all self-incriminating statements are prohibited by the Fifth Amendment. *Id.* at 300. Rather, the Fifth Amendment "prohibits only self-incrimination obtained by a genuine compulsion of testimony." *Id.* (quotation

omitted). "In order for the privilege to apply, two distinct elements must be present—compulsion and incrimination." *Id.* at 299.

Incrimination

At the commitment hearing, an MSOP psychologist testified that the treatment program permits discussion of offenses without requiring a patient to incriminate himself. Additionally, the MSOP consent form for participation in treatment asks a patient to acknowledge his understanding "that [he] will be expected to reveal information about [his] past sexual behaviors and the people [he] victimized, but will not be required to provide specific information that could incriminate [him]." The form also asks the patient to acknowledge "that if [he does] identify any specific child or vulnerable adult as a person [he] victimized, and this offense has not been previously reported to authorities, the treatment professionals are mandated to report that information to the authorities." But the portion of the MSOP treatment policy contained in the record provides that victims' names, offense dates, and other identifying information "are not required for participation in" the treatment program.

Nothing in the record establishes that MSOP has refused to treat Stevens for his failure to disclose incriminating information. Instead, the record reflects that Stevens has consistently stated to MSOP personnel that he cannot participate in treatment because he cannot and will not talk about the two alleged victims in criminal convictions he is challenging in postconviction proceedings. On this record, we conclude that Stevens has not demonstrated that he must necessarily incriminate himself to participate in treatment or that he has suffered any consequences related to a failure to self-incriminate. And,

even if we were to conclude that participation in MSOP treatment requires self-incrimination, Stevens must also demonstrate compulsion to trigger a claim of violation of his Fifth Amendment privilege.

Compulsion

Stevens argues that not being allowed to progress through treatment without incriminating himself is sufficient compulsion to trigger the privilege. We disagree. "The compulsion element of the privilege against self-incrimination is present when the state attaches sufficiently adverse consequences to the choice to remain silent that a person is compelled to speak." *Johnson*, 735 N.W.2d at 300. "[N]ot all adverse consequences imposed by the state rise to the level of compulsion." *Id.*

Stevens is under an indefinite commitment at MSOP. Stevens, like all patients, has the right to refuse treatment. Although the treatment consent form makes it clear that failure to participate in treatment will prolong a patient's stay at MSOP, participation in treatment does not guarantee release. Unlike the DOC inmates in *Johnson*, whose period of incarceration was extended as discipline for failure to consent to treatment, extended commitment is not imposed as discipline for refusing treatment at MSOP. *See Johnson*, 735 N.W.2d at 311-12 (holding that extending incarceration for failure to participate in treatment constitutes compulsion). Stevens has not identified any adverse consequence or disciplinary action imposed by MSOP as a direct result of refusing treatment. *Cf. Hydrick v. Hunter*, 500 F.3d 978, 992 (9th Cir. 2007) (identifying consequences imposed on persons committed under California's Sexually Violent Predators Act who declined to participate in a treatment program that required admissions of offenses), *pet. for cert.*

filed, 76 U.S.L.W. 3410 (U.S. Jan. 17, 2008) (No. 07-958). Therefore, because Stevens is not compelled to incriminate himself at MSOP, the Fifth Amendment privilege against self-incrimination does not apply to his commitment.[1]

We further note that Stevens is not, as he asserts, "committed for treatment." He is committed because he meets the criteria for commitment as a SDP. The United States Supreme Court has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Kansas v. Hendricks*, 521 U.S. 346, 366, 117 S. Ct. 2072, 2084 (1997). At the commitment hearing, one expert testified that he was not certain that Stevens would participate in treatment, and that if Stevens does not receive treatment, he has to be supervised and kept away from the community. Another expert testified that outpatient sex offender treatment would not be sufficient for Stevens because he had not completed such treatment before and because it is not as intensive as inpatient treatment. Based on this testimony, the district court concluded that there is no less-restrictive alternative to MSOP that meets Stevens's need for treatment and protects public safety.

[1] At oral argument on appeal, Stevens's attorney argued that he is asserting both a First and Fifth Amendment privilege. But the First Amendment issue was not raised in the district court or briefed on appeal and is therefore waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued or considered in the district court). Stevens's brief cited a California case that dealt with both First and Fifth Amendment rights, but mere citation without substantive analysis is not sufficient to preserve a First Amendment claim in this case. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

II. Sufficiency of mental disorder diagnosis

Stevens argues that his continued confinement without evidence of a significant mental disorder violates his substantive-due-process rights. Stevens denies that he is using the habeas corpus petition as a substitute for his failed direct appeal challenging his initial commitment. He contends that he is challenging, by habeas corpus, his *continued* commitment based on a lack of evidence that he currently suffers from any mental disorder. But we conclude that Stevens's failure to timely appeal his commitment is a procedural bar to his current argument that the district court clearly erred in finding that, at the time of commitment, he suffered from a mental disorder that supported commitment as a SDP. Specifically, Stevens's argument that a diagnosis of personality disorder not otherwise specified (PDNOS) is constitutionally insufficient to support his initial commitment is procedurally barred.

We further conclude that Stevens's constitutional challenge to continued commitment on the basis that a diagnosis of PDNOS cannot support commitment is without merit. Stevens's commitment is not based solely on the PDNOS diagnosis. A SDP is "a person who: (1) has engaged in a course of harmful sexual conduct . . . ; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2006). States have considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. *Hendricks*, 521 U.S. at 358-59, 117 S. Ct. at 2081 (rejecting the argument that civil commitment must be predicated on a finding of serious mental illness).

At Stevens's commitment trial, two expert witnesses testified that, as a result of his diagnosed mental disorder, PDNOS with antisocial and narcissistic traits, Stevens lacks the ability to adequately control his sexually harmful behavior. Both experts also testified that Stevens is highly likely to engage in acts of harmful sexual conduct in the future. In *Adams v. Bartow*, 330 F.3d 957, 961-63 (7th Cir. 2003), the court rejected appellant's challenge to commitment based on status as a convicted sex offender with antisocial personality disorder (APD) because commitment was also based on evidence "that Adams was 'substantially probable' to commit another sexually violent offense," distinguishing him from other inmates who had committed sex offenses and who are likely diagnosable with APD." Similarly, the district court here correctly concluded that the record contained

> clear and convincing evidence that, as a result of [Stevens's] past course of harmful sexual conduct, his mental disorders, his chemical dependency and sex offender treatment history, his lack of remorse or sincere empathy, and his lack of power to control his sexual impulses, it is highly likely that Stevens will engage in further harmful sexual conduct and he is dangerous to others.

Stevens also asserts that his commitment is unconstitutional because more current MSOP records demonstrate that he no longer suffers from PDNOS or any other mental disorder. But the supreme court has rejected the argument that a commitment cannot be continued unless the patient meets the initial criteria for commitment. *See Call v. Gomez*, 535 N.W.2d 312, 318 (Minn. 1995) (holding that, in the context of commitment as a sexual-psychopathic personality, so long as the application of statutory discharge criteria meets the constitutional requirement that the nature of the commitment be reasonably

related to the purpose for which the person was committed, due process is satisfied). Additionally, Stevens may challenge his continued commitment by petitioning the special review board for full or provisional discharge or transfer, and may seek judicial review of the board's decisions. Minn. Stat. §§ 253B.18-.19 (2006). Therefore, Stevens's challenge to continued commitment based on his current mental-health status is not properly raised in a petition for writ of habeas corpus.

We conclude that Stevens's continued commitment as a SDP does not violate substantive due process and that the district court did not err in denying Stevens's petition for a writ of habeas corpus.

Affirmed.