This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2155

In the Matter of the Risk Level Determination of T. V.

Filed October 28, 2008
Affirmed
Ross, Judge

Minnesota Department of Corrections
OAH No. 61-1100-18003-2

Lawrence Hammerling, Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for relator)

Lori Swanson, Attorney General, Willow Jean Najjar, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, Judge.*

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

ROSS, Judge

This appeal requires us to determine whether the state appropriately designated 39-year-old T.V. as a predatory sex offender after he was convicted of illegal possession of a firearm but acquitted of criminal sexual conduct and other charges related to predatory behavior. T.V. appeals from an administrative law judge's order affirming the End of Confinement Review Committee's assignment of a risk level that requires him to

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

register as a predatory offender. Because T.V.'s conviction arose from the same set of circumstances that gave rise to his criminal sexual conduct charges, we affirm.

FACTS

The administrative law judge (ALJ) determined that T.V. qualified as a risk-level two predatory sex offender based on facts that we summarize here and that the ALJ considered to be undisputed. On May 9, 1999, T.S. and Zachurus Turner drove to St. Paul from Rochester for crack cocaine. The two planned to offer sex with T.S. in exchange for drugs. T.S. and Turner met T.V., who told T.S. and Turner that he had friends who would furnish cocaine for sex with T.S.

At first, the arrangement proceeded as agreed upon, but T.S. and Turner quickly became victims in their own illegal deal. T.V. took the two to a house in the Frogtown area of St. Paul, where T.S. had "sex with one of [T.V.'s] friends in exchange for crack cocaine." *State v. Varner*, 643 N.W.2d 298, 301 (Minn. 2002). But when Turner stepped outside, he overheard T.V. and others discussing a plan that aroused his concern. The record is unclear about the content of that conversation, but it led Turner immediately to hide his car keys. As Turner returned inside, T.V. met him at the door, gun in hand. T.V. demanded Turner's keys, and when Turner denied having them, T.V. struck him with the gun. "[T.V.] then forced Turner to strip naked, threatened him, and ultimately locked him in the basement." *Id.* T.V. turned his attention to T.S. While Turner was locked in the basement, T.S. had sex with T.V. and others, but she did not do so in exchange for drugs. She was afraid of T.V., and she continued to engage in sex out of fear of what T.V. did to Turner.

Turner eventually left the basement and the house, but he left T.S. behind. She remained there two days, after which she escaped and called police. Police arrived at the home and found up to five men, several dogs, drug paraphernalia, and a handgun. T.V. was not at the house when police arrived, but they arrested him later.

The state charged T.V. with one count of possession of a firearm by an ineligible person. That criminal complaint was later amended to include two counts of first-degree criminal sexual conduct, two counts of second-degree assault, two counts of kidnapping, false imprisonment, promotion of prostitution, and third-degree possession of a controlled substance. A jury found T.V. guilty of possession of a firearm by an ineligible person and of third-degree possession of a controlled substance. But it acquitted him of the other charges. T.V. appealed to this court and then to the supreme court, and the case was ultimately reversed and remanded because of juror misconduct. *Id.* at 303–07. After remand, T.V. pleaded guilty to possession of a firearm by an ineligible person and third-degree possession of a controlled substance. Because of the nature of T.V.'s offenses, the End of Commitment Review Committee (ECRC) performed a risk-level assessment to determine, among other things, whether he must register as a sex offender. The ECRC assigned T.V. a risk level of two, which requires him to register as a predatory sex offender. T.V. appealed the determination and an administrative law judge affirmed the risk-level assignment. T.V. now appeals that administrative law judge's decision.

D E C I S I O N

T.V. argues that the ALJ erred by affirming the ECRC's risk level assignment. We deem the ECRC's assignment to be proper.

The ECRC assesses the public risk posed by each alleged predatory offender who will soon be released from confinement, and it assigns a risk level accordingly. Minn. Stat. § 244.052, subd. 3(a), (d)(i) (Supp. 2007). This court has previously noted that the ECRC has some discretion in making a risk level determination. *See In re R.B.P.*, 640 N.W.2d 351, 355 (Minn. App. 2002) ("We thus conclude that based on the statutory scheme, the intent of the legislature was to vest some discretion in the ECRC."). This court will reverse an ALJ's decision that (1) violates a constitutional provision; (2) exceeds the agency's statutory authority or jurisdiction; (3) reflects an error of law or procedure; (4) is arbitrary or capricious; or (5) is unsupported by substantial evidence. Minn. Stat. § 14.69 (2006); *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

A predatory offender is a person who is required to register under Minnesota Statutes section 243.166. Minn. Stat. § 244.052, subd. 1(5) (2006). That section states:

> A person shall register under this section if:
>
> (1) the person was charged with or petitioned for a felony violation of or attempt to violate any of the following, and convicted of . . . that offense *or another offense arising out of the same set of circumstances*:
>
> . . . .
>
> (ii) kidnapping under section 609.25; or
>
> (iii) criminal sexual conduct under section 609.342; 609.343; 609.344; 609.345; or 609.3451, subdivision 3; or 609.3453[.]

Minn. Stat. § 243.166, subd. 1b(a) (2006) (emphasis added).

T.V. particularly challenges the relationship that the ECRC found to exist between T.V.'s alleged predatory conduct and the conduct supporting his conviction. The ECRC

determined that T.V. is a predatory offender because he had been charged with the predatory offenses of kidnapping and criminal sexual conduct, and because he was convicted of a charge—ineligible possession of a firearm—arising from the same circumstances as the predatory offenses. T.V. therefore met the registration requirements of section 243.166. A risk assessment recommendation report to the ECRC noted that he has an extensive criminal history. The report highlighted several allegations that T.V. held females against their will, including T.S., and T.V.'s former wife. T.V. also had one prior charge and conviction for fourth-degree criminal sexual conduct as a juvenile. Based on these considerations, the ECRC assigned T.V. a risk level of two.

The ALJ reviewed that assignment and concluded that T.V. failed to meet his burden of proving by a preponderance of the evidence that the risk-level determination assigned by the ECRC was erroneous. The ALJ reasoned that the handgun that T.V. was ineligible to possess was instrumental in his alleged criminal sexual conduct with T.S. because T.S. testified that she had sex with T.V. primarily because she feared that he would use the handgun on her. The ALJ therefore determined the ECRC did not err by concluding that T.V. must register as a predatory offender, reasoning that his handgun conviction arose from the same set of circumstances as his alleged criminal sexual conduct.

T.V. contends that his conviction for ineligible possession of a firearm did not arise from the same set of circumstances as his charges for kidnapping and criminal sexual conduct and that he is therefore not a person required to register by statute. He cites several unpublished opinions of this court as support. But our unpublished cases

carry no precedential authority, Minn. Stat. § 480A.08, subd. 3 (2006), and the cited cases appear to weigh against T.V.'s arguments.

Precedent supports the ECRC's decision that T.V. is a predatory offender based on the relationship between his drug and handgun convictions and the predatory conduct. In *Boutin v. LaFleur*, a defendant had been charged with two counts of third-degree criminal sexual conduct, one count of third-degree assault, and one count of fifth-degree assault. 591 N.W.2d 711, 713 (Minn. 1999). The charges resulted from the defendant's girlfriend's report that the defendant physically and sexually assaulted her. *Id.* The defendant pleaded guilty to third-degree assault, and the remaining charges were dismissed. *Id.* at 713–14. The defendant challenged the requirement that he register as a sex offender under section 243.166. *Id.* at 714. But the supreme court upheld the requirement, finding that the assault conviction arose from the same circumstances as the criminal sexual conduct charges for which he had not been convicted. *Id.* at 714–16. Similar to the offender's conduct in *Boutin*, T.V.'s conduct leading to conviction arose out of the same circumstances as the alleged criminal sexual conduct for which he was not convicted.

We therefore reject T.V.'s contention that because he did not use his handgun when sexually assaulting T.S., his conviction for ineligible possession did not arise from the same set of circumstances as the sexual conduct. T.S. testified that she had sex with T.V. specifically because she feared that he would use the handgun against her. She had just witnessed T.V. use it to threaten, degrade, humiliate, and restrain Turner. The language of section 243.166 allows a broad relationship between the predatory conduct

and conviction of another offense. We hold that the ECRC appropriately determined that T.V. is assigned a risk level of two and required to register as a sex offender. The ALJ did not err when it affirmed that determination.

T.V. also contends that because his drug and firearms convictions do not include elements of criminal sexual conduct, they did not arise from the same circumstances. But section 243.166 does not require that the crimes for which an offender is convicted have elements in common with the predatory crimes.

Affirmed.