STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0741

William Davis, petitioner,
Appellant,

vs.

Jeff Peterson, et al.,
Respondents.

Filed March 10, 2009
Affirmed
Larkin, Judge

Anoka County District Court
File No. 02-CV-07-2894

William Davis, OID #167073, MCF-Rush City, 7600 525th Street, Rush City, MN 55069 (pro se appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101 (for respondents)

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his petition for a writ of habeas corpus, arguing that the commissioner of corrections (1) lacked authority to impose intensive-supervised-release conditions and that the conditions imposed were

unreasonable; (2) imposed an ex-post-facto punishment; (3) violated the separation-of-powers doctrine; and (4) unlawfully used institutional disciplinary records in a manner that contradicts the department of corrections's policies. Because the district court correctly determined that the commissioner of corrections lawfully imposed reasonable intensive-supervised-release conditions, we affirm.

FACTS

In 1985, appellant William Davis was convicted of aggravated criminal-sexual assault in Illinois and was incarcerated for this offense from 1985 until 1991. In 1991, Davis was convicted of second-degree criminal-sexual assault in Minnesota and was incarcerated for this offense from 1992 until 1999. In May 2001, Davis was convicted of first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2000), and was committed to the custody of the commissioner of corrections ("commissioner") for 108 months. While incarcerated, Davis violated disciplinary rules on numerous occasions. At least 12 of these violations involved assaultive or disorderly conduct.

During an end-of-confinement review performed in conjunction with Davis's release from custody for the 1991 offense, the commissioner designated Davis a level III offender. In July 2001, the commissioner reaffirmed Davis's designation as a level III offender.

In April 2006, the commissioner prepared a Sexual Psychopathic Personality/Sexually Dangerous Person Review Report (SPP/SDP Report) in preparation for Davis's transition to intensive supervised release. The commissioner reviewed

Davis's criminal, probation, institutional, mental health, and sexual treatment histories. The SPP/SDP Report notes that Davis has never completed sex-offender treatment.

On May 21, 2007, the commissioner placed Davis on intensive supervised release subject to the following conditions: complete sex-offender treatment, wear a global-positioning system (GPS) electronic-surveillance device, refrain from using a computer with internet access, and refrain from entering adult establishments. The commissioner also required Davis to "successfully complete the Residential Program at 180 Degrees, Inc. . . . as directed by agent/designee."

On June 7, 2007, a hearings and release officer found that Davis had violated his conditions of release by failing to successfully complete the residential program at 180 Degrees, Inc. and by failing to comply with GPS electronic surveillance as directed. The hearing officer revoked Davis's release, resulting in Davis's re-incarceration.

Davis filed a petition for a writ of habeas corpus. He claimed that his intensive-supervised-release conditions were not reasonably related to his current conviction, and that the commissioner (1) violated the separation-of-powers doctrine, (2) violated due process, (3) placed him in double jeopardy, (4) imposed an ex-post-facto punishment, and (5) unduly restricted his liberty. The district court denied Davis's request for relief to the extent that it was based upon separation-of-powers, due-process, ex-post-facto, and double-jeopardy theories. But the district court set an evidentiary hearing regarding Davis's claims that his release conditions (1) unduly restricted his liberty, and (2) were

not reasonably related to his aggravated robbery offense.[1] After the hearing, the district court concluded that the conditions were reasonable and denied Davis's petition for a writ of habeas corpus. This appeal follows.

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." *Loyd v. Fabian*, 682 N.W.2d 688, 690 (Minn. App. 2004) (quoting Minn. Stat. § 589.01 (2000)), *review denied* (Minn. Oct. 19, 2004); *see* Minn. Stat. § 589.01 (2008) (establishing that persons imprisoned or otherwise restrained of liberty may apply for relief). "An appellate court will review a habeas corpus decision de novo where, as here, the facts are undisputed." *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

In Minnesota, "every inmate shall serve a supervised release term upon completion of the inmate's term of imprisonment." Minn. Stat. § 244.05, subd. 1 (2006). While an inmate is on supervised release, the "inmate is and remains in the legal custody and under the control of the commissioner, subject at any time to be returned to . . . [imprisonment] for the confinement or treatment of convicted persons and the parole rescinded by the commissioner." Minn. Stat. § 243.05, subd. 1(b) (2006).

An inmate may also be placed on "intensive supervised release." Minn. Stat. § 244.05, subd. 6 (2006).

[1] The commissioner argued that Davis lacks standing to contest any condition of release other than the two that he was found to have violated. The district court determined that Davis's challenge to his conditions of release was judiciable. The state does not raise this issue on appeal.

> 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). . . . The commissioner shall order that all level III predatory offenders be placed on intensive supervised release for the entire supervised release, conditional release, or parole term. *The commissioner may impose appropriate conditions of release on the inmate including but not limited to . . . treatment requirements; and electronic surveillance. 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. (emphasis added). Minn. Stat. § 244.14, subd. 1(2) (2006) states the following goal: "to protect the safety of the public." Thus, the commissioner had authority to place Davis 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 electronic surveillance. Minn. Stat. § 244.05, subd. 6. And, the commissioner was specifically authorized to order Davis to participate in an appropriate sex-offender program as a condition of release because Davis meets the department of corrections's (DOC) definition of a sex offender. *Id.*

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."[2] *Roth v. Comm'r of Corrections*, 759 N.W.2d 224, 228 (Minn. App. 2008) (citing DOC Div. Directive 203.013). Davis qualifies as a sex

[2] The designation of "sex offender" is an internal prison label.

offender even though his current offense is not sex-related, because Davis is subject to predatory-offender registration having been convicted of "a crime against the person." Minn. Stat. § 243.167, subds. 1, 2(a)-(b) (2000) (defining aggravated robbery as a crime against person). Davis also has prior convictions for second-degree criminal-sexual assault and aggravated criminal-sexual assault, offenses that are sex-related. Given Davis's status as a sex offender, the commissioner was authorized to order Davis to participate in sex-offender treatment as a condition of intensive supervised release. Minn. Stat. § 244.05, subd. 6.

We next consider whether Davis's intensive-supervised-release conditions were reasonable. The Minnesota Supreme Court has stated that conditional-release conditions "must be reasonably related to the offense and must not unduly restrict the [parolee's] liberty." *State v. Schwartz*, 628 N.W.2d 134, 141 (Minn. 2001). In *Schwartz*, the Minnesota Supreme Court looked to "traditional term[s] of probation" in assessing the reasonableness of conditional-release conditions. *Id.* (citing ABA Standards for Criminal Justice—Sentencing, Standards 18-3.13 (d)(vii) (3d ed. 1994)). Traditional terms of probation include: "cooperating with the required terms of supervision"; "undergoing available medical, rehabilitative, psychological or psychiatric treatment"; and "refraining from consorting with specified groups of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities." ABA Standards for Criminal Justice—Sentencing 18-3.13(d)(i), (v), (vii). Moreover, traditional probation terms may appropriately address an individual's criminal history. *Id.* at 18-3.13(d).

This court has stated "although the conditions of supervised release, including intensive supervised release, may resemble conditions of probation, the status of the offender is significantly different. The legislature has explicitly granted authority over supervised release to the DOC." *Kachina v. State*, 744 N.W.2d 407, 409 (Minn. App. 2008) (citing Minn. Stat. § 244.05, subd. 3(2) (2006)). The district court therefore reasoned that the difference between probationer status and placement on intensive supervised release suggests that the *Schwartz* test must be applied with the specific purposes of supervised release in mind. We agree. And the legislature has given the commissioner broad authority over inmates on supervised release and the specific power to require sex-offender treatment of inmates who, like Davis, meet the DOC's definition of a sex offender. When an agency such as the DOC makes a decision that is within its area of expertise, the decision "enjoy[s] a presumption of correctness." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

Davis's criminal history includes multiple sex offenses and crimes involving force. Davis has never completed sex-offender treatment. Although Davis's prior sex-offense convictions predate the current offense by approximately 16 and ten years, Davis was incarcerated for the vast majority of that time. Davis has spent little of the intervening time without correctional supervision. We conclude that Davis's intensive-supervised-release conditions were consistent with traditional terms of probation and with a significant purpose of intensive supervised release—to protect the safety of the public. Minn. Stat. § 244.05, subd. 6.

Davis's argument that application of Minn. Stat. § 244.05, subd. 6, results in ex-post-facto punishment is without merit. An ex-post-facto law is one that "renders an act punishable in a manner in which it was not punishable when it was committed." *State v. Manning*, 532 N.W.2d 244, 247 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. July 20, 1995). To be considered an ex-post-facto law, the new law must "(1) punish as a crime an act which was innocent when committed; (2) increase the burden of punishment for a crime after its commission; or (3) deprive one charged with a crime of a defense that was available when it was committed." *Id.* Davis's argument is based on his belief that his conditions of release are imposed upon his prior criminal-sexual-conduct sentences. But Davis's intensive-supervised-release conditions are not imposed upon his 1985 and 1991 sentences. Rather, the conditions are imposed in connection with Davis's 2001 aggravated-robbery offense. The commissioner had authority to place Davis on intensive supervised release subject to conditions of release, including sex offender treatment, at the time of Davis's 2001 offense. Minn. Stat. § 244.05, subd. 6 (2000). Therefore, the commissioner's imposition of intensive-supervised-released conditions on Davis's aggravated-robbery offense does not result in ex-post-facto punishment.

Davis also argues that the commissioner violated the separation-of-powers doctrine. "[T]he commissioner's statutory authority over supervised and conditional release operates within and does not impede the court's sentencing authority." *Schwartz*, 628 N.W.2d at 141; *see also Kachina*, 744 N.W.2d at 407-08 (noting the DOC has authority to determine the conditions of supervised release, including assigning an

offender to intensive supervised release, and such a determination does not infringe on the district court's sentencing authority). The commissioner acted within her lawful authority when she imposed Davis's intensive-supervised-release conditions and in no way infringed on the judiciary's sentencing authority. Davis's separation-of-powers argument is without merit.

Finally, Davis argues that the district court erred by relying on his institutional disciplinary record in a manner that contradicts DOC policy. Assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). And "[n]o extra benefits will be given to pro se litigants." *State v. Seifert*, 423 N.W.2d 368, 372 (Minn. 1988). Because Davis cites no law in support of his argument, this issue is waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (noting issues not briefed on appeal are waived).

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals