STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1146

Scott Richard Seelye, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 16, 2009
Affirmed
Lansing, Judge

Cass County District Court
File No. 11-K9-02-000493

Scott Richard Seelye, OID #100679, 5329 Osgood Avenue, Stillwater, MN 55082 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Christopher Strandlie, Cass County Attorney, Cass County Courthouse, P.O. Box 3000, 300 Minnesota Avenue, Walker, MN 56484 (for respondent state)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

LANSING, Judge

In this pro se appeal from the denial of postconviction relief, Scott Seelye maintains that he is entitled to a correction of his sentence because the district court, on resentencing, failed to advise him of the effect of disciplinary offenses on the execution of his sentence as required by Minn. Stat. § 244.101 (2006). Because Seelye received the statutory advisory at the time of his initial sentence and because a failure to provide the advisory does not in itself invalidate a sentence, we affirm.

F A C T S

Scott Seelye was convicted of first- and second-degree burglary and first- and second-degree arson for burglarizing and setting fire to a building that housed a grocery store and a residential apartment. *State v. Seelye*, No. A03-1200, 2004 WL 2219663, at *1 (Minn. App. Oct. 5, 2004), *review denied* (Minn. Jan. 26, 2005). At sentencing, the district court, consistent with Minn. Stat. § 244.101, informed Seelye that the total length of his executed sentence was 240 months, an upward departure, and that he would serve a minimum of 160 months in prison. The district court specifically advised him that, "[I]f you commit any disciplinary offenses in prison that could result in your serving the entire [240] months."

Seelye appealed his conviction and sentence and we remanded for reconsideration of the upward departure in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Seelye*, 2004 WL 2219663, at *5-*6. On remand, the district court sentenced

Seelye to concurrent sentences of 112 months for first-degree burglary and first-degree arson.

Following resentencing, Seelye brought this postconviction-relief action for correction of his sentence. He alleged that his sentence must be corrected because, at resentencing, the district court did not comply with the requirements for pronouncing an executed sentence under Minn. Stat. § 244.101. The postconviction court denied Seelye's petition, and Seelye appeals.

D E C I S I O N

"When a felony offender is sentenced to a fixed executed sentence for an offense committed on or after August 1, 1993," the sentencing court is required to advise the offender of the length of the executed sentence; the amount of time the offender must serve in prison; the amount of time the offender will serve on supervised release, assuming no disciplinary offenses; and that the amount of time the offender serves in prison may be extended if the offender commits disciplinary offenses while in prison. Minn. Stat. § 244.101, subds. 1-2. Seelye argues that his sentence must be corrected because the district court failed to explain at resentencing that, if he committed disciplinary offenses, he could be required to serve his entire executed sentence in prison.

Whether a petitioner's sentence requires correction is generally a question of law that we review de novo. *See State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008) (reviewing de novo whether sentencing departure was improper). When the determination turns on the application of a specific statute, the construction of that statute

is a legal conclusion that also receives de novo review. *See State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003) (interpreting criminal statute).

We reject Seelye's argument that his sentence must be corrected for two reasons. First, the district court properly informed Seelye at his initial sentencing hearing that he could be required to serve his entire executed sentence in prison if he committed any disciplinary offenses. Thus, Seelye had actual notice of the general rule that a defendant's sentence may be extended if he commits disciplinary offenses.

Second, we construe Minn. Stat. § 244.101 as a directory, not a mandatory, statute, and noncompliance with a directory statute does not equate to invalidity of the action taken. *Sullivan v. Credit River Twp.*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974); *see also State v. Thomas*, 467 N.W.2d 324, 326-27 (Minn. App. 1991) (upholding conviction despite violation of directory statute because defendant failed to show prejudice). Although the statute states that the district court "shall" explain the effect of disciplinary offenses on the execution of the defendant's sentence, the use of the word "'shall' is not decisive of whether a statutory provision is directory or mandatory." *State v. Jones*, 234 Minn. 438, 440, 48 N.W.2d 662, 663 (1951). Rather, to determine the import of "shall," we must examine the word's context and the statute's purpose. *Id.* at 441-42, 448 N.W.2d at 663-64.

We are particularly persuaded that the statutory provision is directory because it does not declare the consequences of the district court's failure to comply. *See Sullivan*, 299 Minn. at 176-77, 217 N.W.2d at 507 (indicating that declaration of consequences is significant factor). Additionally, we find guidance in the rules of criminal procedure,

which set forth similar requirements for district courts at sentencing and specifically state that a violation of a rule does not in itself warrant reversal. *See* Minn. R. Crim. P. 27.03, subd. 4(A) (stating that court "[s]hall state the precise terms of the sentence"); Minn. R. Crim. P. 31 (stating that errors shall be disregarded unless they affect substantial rights); *cf. State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994) (stating that, on matters of procedure, "Rules of Criminal Procedure take precedence over statutes"). Because Minn. Stat. § 244.101 is directory, the district court's failure to comply with the statute at resentencing does not in itself invalidate or require a correction of Seelye's sentence.

Finally, we note that the state, in its response brief, contends that Seelye has failed to establish any prejudice as the result of the alleged failure to advise him that he could be required to serve his entire executed sentence in prison if he committed disciplinary offenses. *See Thomas*, 467 N.W.2d at 326-27 (requiring showing of prejudice). In his reply brief, Seelye responds that his due process rights have been violated by the extension of his prison term beyond his supervised release date. *See Carrillo v. Fabian*, 701 N.W.2d 763, 773 (Minn. 2005) (holding that prisoner is entitled to certain procedural protections before prison term can be extended beyond supervised-release date). Seelye did not allege sufficient facts to raise a due process issue in the district court and he did not provide any evidence of the extension of his actual imprisonment into the period of supervised release. *See Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997) (affirming denial of postconviction relief, in part, because petitioner "failed to allege sufficient facts"). On appeal, we are able to review only those issues presented to and considered in

the district court; thus this additional unsupported allegation cannot provide a basis for reversal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Affirmed.