**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-0814**

State of Minnesota, ex rel. Terry Lee Branson, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

**Filed August 11, 2009**
**Affirmed**
**Toussaint, Chief Judge**

Swift County District Court
File No. 76-CV-08-508

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Krista Guinn Fink, Department of Corrections, 1450 Energy Park Drive, Suite 200, St. Paul, MN 55108-5219 (for respondent)

Considered and decided by Toussaint, Chief Judge; Ross, Judge; and Larkin, Judge.

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

**TOUSSAINT**, Chief Judge

This appeal is from an order denying appellant Terry Lee Branson's petition for a writ of habeas corpus challenging the days of additional incarceration time he received in disciplinary proceedings over a five-year period for repeatedly refusing sex-offender treatment. Because the district court did not err in finding that appellant's punishment was reasonable, we affirm.

## D E C I S I O N

Appellant argues that respondent Joan Fabian, Commissioner of Corrections, violated his right to substantive due process by disciplining him four times for the same conduct of refusing sex-offender treatment. He also argues that the punishment imposed, a total of 1,800 days of added incarceration time, is arbitrary and excessive.

In denying appellant's habeas petition, the district court noted that the legislature amended Minn. Stat. § 244.03 in 1999 to allow respondent to impose disciplinary sanctions for failure to participate in rehabilitative programs. The court, applying a "reasonableness" test rather than strict scrutiny, concluded that the requirement that appellant participate in sex-offender treatment was rational given his "sex offense history, statistical likelihood of reoffense, and the apparent failure of prior treatment efforts." The court also rejected appellant's argument that the extended incarceration time imposed on him was arbitrary and excessive, noting the deference due to prison officials' judgments.

This court reviews a habeas corpus decision de novo when the facts are undisputed, as they are here. *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Appellant was convicted and sentenced in 1994 for attempted kidnapping and two counts of second-degree assault. *State v. Branson*, 529 N.W.2d 1, 3 (Minn. App. 1995), *review denied* (Minn. Apr. 18, 1995). In the early morning hours of December 10, 1993, appellant confronted a woman who was entering her car in the parking lot of the establishment where she worked. *Id.* Appellant "grabbed her by the hair, and put a knife to her throat." *Id.* He stated that his intent was to take the victim hostage, but she escaped. *Id.*

Based on appellant's history of sexual offenses and on an interview with him, prison staff recommended in 2001 that appellant be required to complete the Minnesota Sex Offender Program, as well as chemical-dependency treatment. On four occasions, however, appellant has refused to sign the Minnesota Sex Offender Program treatment agreement. For these refusals of treatment, respondent has found appellant to have violated disciplinary rules and has imposed sanctions of 360, 540, 360 and 540 days, for a total of 1,800 days of additional incarceration time.

Appellant argues that respondent violated his right to substantive due process because its disciplinary decisions were arbitrary. *See generally Jones v. Borchardt*, 759 N.W.2d 50, 56 (Minn. App. 2009) (noting that substantive due process protects a person from "arbitrary, wrongful government actions" regardless of the procedures provided).

In analyzing a substantive-due-process claim, we first consider whether [the

> individual] possessed a right arising under the Fourteenth Amendment and then determine whether [the government's] conduct deprived [the individual] of that right within the meaning of the Due Process Clause. To meet this burden, [the individual] must demonstrate that the government action complained of is truly irrational, that is something more than arbitrary, capricious, or in violation of state law.

*Id.* (citations and quotation omitted). If a "fundamental right" is at stake, a court applies strict scrutiny. *See generally Bowers v. Hardwick*, 478 U.S. 186, 191-92, 106 S. Ct. 2841, 2844 (1986) (discussing "substantive content" of due process clauses as limited to fundamental liberties "deeply rooted" in country's history or, in other words, fundamental rights), *overruled by Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478 (2003) (holding that *Bowers* "fail[ed] to appreciate the extent of the liberty at stake" in upholding homosexual-sodomy statutory prohibition).

Respondent concedes that appellant has a liberty interest in his supervised release date. But there is no "fundamental right" to be released from prison on a date earlier than the sentence expiration date. *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 796 (Minn. 1999), *rev'd on other grounds as recognized in Johnson v. Fabian*, 735 N.W.2d 295, 304 (Minn. 2007) (quotation omitted). Appellant points out that freedom from restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999). But the interest in freedom from restraint does not subject respondent's decisions to discipline by adding prison time for someone already incarcerated to strict-scrutiny review. *Cf. Morrow*, 590 N.W.2d at 793 (noting "important distinction" between early release from prison "and losing one's freedom when one is not serving a sentence").

Appellant argues that the strict-scrutiny standard should be applied because the mandatory-treatment rule is not necessary for proper prison administration. But in the case he cites, *Johnson v. California*, the Court was addressing a government-imposed racial classification applied within the prison. 543 U.S. 499, 509-10, 125 S. Ct. 1141, 1148-49 (2005). The Court noted that strict scrutiny is applied to *all* racial classifications. *Id.* at 506, 125 S. Ct. at 1146. Appellant's sanction was not based on any classification that would itself trigger the application of strict scrutiny.

In *Morrow*, our supreme court rejected the argument that prison rules must either be limited to those necessary to proper prison administration or else be subjected to strict scrutiny. *See* 590 N.W.2d at 796 (noting that no fundamental rights were at stake). The court concluded that a disciplinary sanction for failing to complete sex-offender treatment was "rationally related to the societal interest in ensuring that sex offenders do not commit new offenses when released from prison." *Id.*

Appellant argues that respondent's disciplinary actions, and the sanctions imposed, are arbitrary. Respondent points out that appellant must show not only that they were arbitrary but also that they were "truly irrational," meaning more than merely arbitrary. *See Borchardt*, 759 N.W.2d at 56 (quotation omitted).

Respondent imposed sanctions of 360, 540, 360, and 540 days for appellant's four refusals of treatment. Respondent's regulations allowed a sanction of 360 days for refusing treatment. It seems clear that the 540-day sanctions were longer because they were imposed for repeat offenses. But in any event, appellant does not challenge the sanctions as exceeding the limits imposed by regulation, but rather as being "arbitrary."

It is apparent that respondent has determined that disciplinary violations that increase the risk of recidivism, including refusing treatment, should be treated very seriously. In his August 2006 refusal, appellant told respondent's hearing officer that he would "never enter a treatment program." He indicated he wanted "to be given 720 days of extended incarceration not the 540 the state is requesting." We cannot conclude that the sanctions imposed were arbitrary. Although the sanction for the third violation, also for a repeat offense, was only 360 days, appellant cannot complain that the 360-day sanction was too light a punishment. Finally, we conclude that appellant cannot challenge the duration of the first two sanctions because he waived the disciplinary hearings in each case.

Respondent argues that res judicata bars appellant's challenge to the first three disciplinary sanctions because he challenged them in his 2005 habeas petition on equal protection grounds, and his appeal of the district court's denial of relief was dismissed. Respondent did not raise this issue in the district court, and we decline to address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that reviewing court may only consider issues presented to and considered by district courts).

Respondent's disciplinary sanctions against appellant for refusing sex-offender treatment did not violate substantive due process and were not arbitrary or excessive. Therefore, the district court's order denying habeas relief must be affirmed.

**Affirmed**.