STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0990

George Robert Van Fossen, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed September 1, 2009
Affirmed
Toussaint, Chief Judge

Chisago County District Court
File No. 13-CV-08-1491

Bradford W. Colbert, Legal Assistance to Minnesota Prisoners, 875 Summit Avenue, Room 254, St. Paul, MN 55105 (for appellant)

Lori Swanson, Attorney General, Margaret E. Jacot, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2128 (for respondent)

Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Stauber, Judge.

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

TOUSSAINT, Chief Judge

Appellant George Robert Van Fossen challenges the district court's denial of his petition for a writ of habeas corpus. He seeks to reverse a 2006 decision by respondent Joan Fabian, Commissioner of Corrections, revoking his supervised release for failure to

complete sex-offender treatment, a condition of his release. Because appellant has failed to identify a fundamental right in remaining on supervised release so as to implicate substantive-due-process concerns, because Minnesota courts have not required that the commissioner determine that a violation of release was intentional or inexcusable before revoking supervised release, and because the facts fail to establish that appellant's failure to complete treatment was unintentional or excusable, we affirm.

D E C I S I O N

On review of an order denying a petition for a writ of habeas corpus, this court gives great weight to the district court's findings of fact and will uphold the findings if reasonably supported by the evidence. *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). This court will review the decision to revoke an offender's release for a clear abuse of discretion. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 27 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

Appellant argues that respondent deprived him of due process by revoking appellant's supervised release because he did not intentionally violate the supervised-release conditions. He asserts that due process requires that an offender be given an opportunity to show that even if a condition of supervised release was violated, mitigating circumstances exist. Appellant appears to base his argument on *State v. Austin*, which requires that a district court find that the offender's violation of probation was intentional or inexcusable before revoking probation. *See* 295 N.W.2d 246, 250 (Minn. 1980); *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (holding that district court must make findings on three *Austin* factors before probation is revoked).

But appellant's argument makes several assumptions that are not legally or factually correct.

First, appellant assumes that mitigating circumstances necessarily excuse violations of supervised release. But the cases cited by appellant as support for his position address procedural, not substantive, due process.[1] *See, e.g., Beardon v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064 (1983); *State v. Cottew*, 746 N.W.2d 632, 634 (Minn. 2008) (holding that *Austin/Modtland* analysis applies only to revocation of probation and execution of underlying sentence, not to imposition of intermediate sanctions for probation violations).

Although courts have recognized similarities between probation and supervised release, courts have also recognized differences between the two and have declined to extend the analysis used in one context to the analysis used in the other. *Compare State v. Martin*, 595 N.W.2d 214, 216 (Minn. App. 1999) (finding no material distinction between probation and parole for purposes of analysis under Fourth Amendment), *review denied* (Minn. Aug. 25, 1999), *with State v. Loveland*, 307 Minn. 518, 521, 240 N.W.2d 326, 328 (1976) (holding that parolees and probationers are not in same class for

[1] An inmate in Minnesota clearly has a liberty interest in his or her supervised-release date that is protected by procedural due process. *Carrillo v. Fabian*, 701 N.W.2d 763, 773 (Minn. 2005). But appellant does not challenge the procedures that were afforded him and does not appear to be making a procedural-due-process claim. In any event, it is unclear whether an inmate has a fundamental right to remain on supervised release so as to implicate substantive-due-process concerns, and appellant fails to identify any such right. *See State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 796 (Minn. 1999) (holding that inmates do not have fundamental right to refuse treatment, to receive treatment or to be released from prison before expiration of lawfully imposed sentence), *overruled on other grounds as recognized in Johnson v. Fabian*, 735 N.W.2d 295, 305 (Minn. 2007).

purposes of determining credit for time served) *and Kachina v. State*, 744 N.W.2d 407, 409 (Minn. App. 2008) (finding that commissioner, not judiciary, sets conditions of release, whereas only judiciary can impose probation conditions). Minnesota courts have been reluctant to apply *Austin* to the supervised-release context. *See, e.g., State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 795 n.1 (Minn. App. 2008) (declining to address whether *Austin* analysis applies to revocation of supervised release when issue not adequately briefed, but noting that *Austin* analysis was adopted to offer guidance to judiciary and that violations of conditions of release involve administrative supervision by the DOC).

Second, appellant asserts that his violations are unintentional or excusable. He claims that he did not intentionally violate the conditions of his supervised release and that he was terminated from the out-patient sex-offender treatment program based on disclosures that he was required to make during therapy regarding his sexual history and his current sexual fantasies. But the record here establishes that appellant was terminated from the out-patient program due to his behavior, attitude, and "his need for a more intensive program within a secure environment." Appellant's therapist explained in a letter to appellant's supervising agent that appellant had recently admitted that he considered himself "'extremely dangerous' due to his violent rape fantasies that he ha[d] been withholding from his treatment group and his therapist." The therapist further explained that appellant had "also recently disclosed a significant amount of additional sexual history including bestiality, sexual contact with minor females, peeping, and raping his wife" that he had not previously disclosed. The therapist concluded that these

disclosures and admissions increased appellant's risk to public safety.

The record also contains the hearing officer's summary of the program director's statements at the revocation hearing and to appellant's supervising agent. The program director explained that appellant was terminated due to public-safety concerns, behavior issues, and his lack of commitment to treatment. The director reported that appellant had withheld information from his group and therapist, that he was perceived as "getting a rush" out of relaying his sexual fantasies and history to the group, and that he was "out of control." The director had contacted appellant's supervising agent and indicated that appellant's termination was related to "public safety and the belief that an out-patient treatment program is not adequate to deal with [appellant]; he was not being forthcoming about his deviant thoughts; primary therapist's concerns about his violent rape fantasies; level of commitment is questionable; and no sincerity in recognizing the problem."

Minnesota courts have consistently upheld revocations based on termination from treatment programs for failure to adequately participate. *See, e.g.*, *State v. Marti*, 372 N.W.2d 755, 759 (Minn. App. 1985) (affirming revocation of probation after probationer was terminated from sex-offender treatment because he did not wish to stay in program and failed to apply intellectual insight and internalize principles), *review denied* (Minn. Oct. 11, 1985); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation after probationer was terminated from sex-offender treatment because he was resistant and unamenable to treatment). The record in this case shows that appellant was terminated for his behavior and lack of commitment, which were factors within his control. His conduct cannot be characterized as "unintentional" or "excusable." Thus,

even if mitigating circumstances were relevant to determining whether to revoke supervised release, the facts of this case fail to establish that appellant's violations were unintended or excusable. *Cf. Beardon*, 461 U.S. at 668-69, 103 S. Ct. at 2070-71 (concluding that it is fundamentally unfair to revoke indigent defendant's probation for failure to pay court-ordered fine absent evidence that defendant was responsible for failure and that alternative forms of punishment would be inadequate).

Finally, appellant refers to the fact that the district court did not hold an evidentiary hearing on his habeas petition. A hearing is unnecessary when a petitioner fails to allege facts sufficient to constitute a prima facie case for relief. *Case v. Pung*, 413 N.W.2d 261, 263 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). Because appellant has failed to make a prima facie case for relief and has not identified the information that he would present were the district court to hold an evidentiary hearing, the district court did not abuse its discretion in failing to hold an evidentiary hearing and in basing its decision on the record before it.

Affirmed.