STATE OF MINNESOTA
IN COURT OF APPEALS
A10-393

State of Minnesota, ex rel., Frank Aguilera, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed May 11, 2010
Affirmed
Toussaint, Chief Judge

Anoka County District Court
File No. 02-CV-09-6292

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, St. Paul, Minnesota; and

Krista J. G. Fink, St. Paul, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Minge, Judge; and Wright, 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 Frank Aguilera's petition for habeas corpus challenging the revocation of his intensive supervised release based on the lack of a suitable residence when he reached his supervised release date. We affirm.

FACTS

Aguilera was sentenced in July 2007 to 45 months for second-degree criminal sexual conduct. He has been designated a level III sex offender and, when he reached his supervised release date in February 2009, was scheduled to go on intensive supervised release under the standard condition that he reside at an approved residence,

At his supervised release date, Aguilera was released to a county hold for a possible civil commitment and agreed to placement at MCF-Moose Lake. On April 28, 2009, the hold was vacated and Aguilera was transported by his supervising agent to the Freeborn County jail because at that point he did not have an approved residence. A violation report was issued because Aguilera did not have an approved residence.

At the intensive supervised release revocation hearing on May 12, 2009, Aguilera's release was revoked and he was ordered back to prison for 90 days. The decision provided that Aguilera "may be release[d] prior to this date to an agent-approved plan." It noted that Aguilera "has no available residence in his committing county of Freeborn" but stated that "release planners are encouraged to explore all options in Ramsey County." Following another hearing on August 10, 2009, another 90 days of re-imprisonment was assigned, for the same basic reason. The decision noted various

possible placements for Aguilera, but none had materialized.

Aguilera filed a petition for a writ of habeas corpus, challenging the revocation of his intensive supervised release as well as his continued incarceration due to the lack of a suitable residence. The district court denied the petition without an evidentiary hearing.

D E C I S I O N

The district court's findings to support its ruling on a petition for habeas corpus are entitled to great weight and will be upheld if reasonably supported by the evidence. *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). Questions of law, however, are reviewed de novo. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

Aguilera argues that he was not "actually release[d]" when, upon reaching his supervised release date, he was placed in the Freeborn County jail due to the lack of an "approved residence." He also argued that the revocation of his supervised release, based solely on the lack of an approved residence and not attributable to any fault of his, violates due process.

1. Release

This court has addressed the problem of the offender whose release plan requires an approved residence but the offender reaches his release date without an approved residence. *See State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 797 (Minn. App. 2008) (concluding that department of corrections had obligation to consider restructuring offender's release plan because there was possibility of available residence in neighboring county).

The statute defining the length of an offender's term of imprisonment does not define the term "release" or specify what must happen at the end of the term of imprisonment. *See* Minn. Stat. § 244.05 (2008). Obviously, for offenders like Aguilera who are placed on "supervised release," the "release" from prison comes with certain conditions. The statute requires that the department of corrections provide an "escort" for an inmate released to a halfway house or residential program. *Id.*, subd. 1c. Level III offenders who must be placed on intensive supervised release are required to serve the first phase under "house arrest at an approved residence." Minn. Stat. §§ 244.05, subd. 6, 244.15, subd. 3(a) (2008). Aguilera cites to no statute requiring that an inmate be at liberty for any period of time when his term of imprisonment has ended.

When Aguilera was released from the custody of the state correctional facility, he became subject to the conditions of his intensive supervised release agreement and the applicable statutes. Under that agreement, which required an "approved residence" as provided by statute, Aguilera was properly detained in the Freeborn County jail because he had no "approved residence" to which to go. This did not change the fact that he had been "released" from prison.

Aguilera attempts to bolster his argument by citing *Carrillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005). But *Carillo* is distinguishable. It involved a delayed release date as the result of a sanction for a disciplinary violation that occurred during the term of imprisonment. *Id.* at 766-68. It did not involve a problem arising in the transition from prison to supervised release, and therefore the court did not have to decide what "release" entails.

Aguilera was released from prison, even though it was in the company of a parole agent and for transport to the county jail.

2. Due Process

Aguilera also argues that it was a violation of due process to revoke his intensive supervised release based on the failure to find an approved residence, when that failure occurred before his release date and without any fault on his part. Aguilera argues that a violation of intensive supervised release should have to be "intentional and inexcusable," as violations of probation must be. *See State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980) (including intentional and inexcusable violation as finding district court must make before revoking probation).

The right to due process includes "substantive components prohibiting 'certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.'" *State v. Netland*, 762 N.W.2d 202, 208 (Minn. 2009) (quoting *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999)) (quotation omitted). Aguilera argues that it is fundamentally unfair to revoke his supervised release based on the failure of a condition (approved residence) that is solely within the control of the department of corrections and that he has no ability to fulfill.

Marlowe recognized that the rules of the department of corrections require some flexibility in planning a release when it is difficult to find a residence for an offender. But there is no specific provision in the rules or statutes that would require the department of corrections to find the offender a place to live on supervised release as part of his release plan. *See Marlowe*, 755 N.W.2d at 796 (noting rejection in unpublished

opinions of argument that department of corrections is obligated to find residence for offender). The department of corrections must consider various factors when approving the residences of level III sex offenders, but it is not obligated to find a residence for the offender. Minn. Stat. § 244.052, subd. 4a(a) (2008).

Marlowe did not spell out the extent of the duty to make accommodations to help a level III offender find an "approved residence." Its holding rests more narrowly on the failure to consider "a suitable residential placement . . . available in a neighboring county." *Marlowe*, 755 N.W.2d at 796. That narrow factual circumstance is not present here. The department of corrections has considered alternative placements in Ramsey County and is not limiting Aguilera to Freeborn County, from which he was committed to prison, or imposing any other arbitrary limitations. Therefore, the revocation of Aguilera's intensive supervised release does not violate *Marlowe*.[1]

Due process requires that a probation violator have an opportunity to present mitigating circumstances. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008). A violation may be considered mitigated if it was unintentional or excusable. *Id.* (citing *Bearden v. Georgia*, 461 U.S. 660, 668-69, 103 S. Ct. 2064, 2070-71 (1983)). Aguilera acknowledges that the "intentional and inexcusable" requirement is not constitutionally mandated, but he cites no case law holding that due process bars a revocation based on a violation that was unintentional or excusable, i.e., mitigated.

[1] Aguilera argues that the "intentional and inexcusable" requirement for probation revocation should apply to revocation of supervised release. *Marlowe* does not address this argument because it was not briefed. *Marlowe*, 755 N.W.2d at 794-95 n.1.

In Minnesota, probation cannot be revoked without such a finding. *See Austin*, 295 N.W.2d at 250. But this requirement is not derived from any constitutional requirements of due process. *Austin* cited a more general, policy-based, holding that revocation cannot be a "reflexive reaction" to technical violations. *Id.* at 251 (citing *Morrissey v. Brewer*, 408 U.S. 471, 479, 92 S. Ct. 2593, 2599 (1972)). But it did not hold that due process requires an "intentional and inexcusable" violation.

Aguilera nevertheless argues that the *Austin* requirement of an "intentional and inexcusable" violation should apply to supervised-release revocation as well as probation revocation. But there is no authority imposing this requirement on supervised-release revocation, which is an administrative rather than a judicial process.

This court has affirmed the revocation of probation for the failure of a condition of probation that was due not to the defendant's actions but rather to the lack of funding for the defendant's court-ordered treatment. *State v. Morrow*, 492 N.W.2d 539, 544-45 (Minn. App. 1992). *Morrow* cites *Bearden*, 461 U.S. at 668, 103 S. Ct. at 2070 n.9, as holding that due process does not preclude revocation of probation "where the probationer does not intentionally violate a term of probation." *Id.* at 545; *see also State v. Thompson*, 486 N.W.2d 163, 165 (Minn. App. 1992) (holding that probation could be revoked when treatment program that was condition of probation ceased to exist).

Thus, even assuming that the law governing probation revocation should apply to supervised-release revocation, Aguilera's due process argument is unconvincing. The revocation decision must include some consideration of whether there are alternative measures available other than imprisonment "to satisfy the state's penological interests."

Morrow, 492 N.W.2d at 545. But here the department of corrections has considered alternative measures in the form of the possible Ramsey County placements.

Affirmed.