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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2132**

Frank Edward Johnson, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

**Filed August 12, 2008
Affirmed
Harten, Judge***

Chisago County District Court
File No. 13-CV-07-861

Frank E. Johnson, 2661 North Buffum Street, Milwaukee, Wisconsin 53212 (pro se appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

Pro se appellant Frank Edward Johnson challenges the district court's denial of his habeas corpus petition and the denial of his motion to remove the district court judge based on claims of bias. We affirm.

FACTS

On 6 February 2003, appellant was sentenced to a concurrent imprisonment of 58 months following his convictions of first-degree burglary and third-degree criminal sexual conduct. The instant case is appellant's fourth appeal related to his convictions.

In an earlier direct appeal, this court found that the evidence was insufficient to support appellant's first-degree burglary conviction. *State v. Johnson*, 679 N.W.2d 378, 384-86, 389 (Minn. App. 2004), *review denied* (Minn. 17 Aug. 2004). In his second appeal, the denial of appellant's petition for postconviction relief was affirmed by this court. *Johnson v. State*, No. A05-240 (Minn. App. 17 Jan. 2006), *review denied* (Minn. 28 Mar. 2006). In an appeal taken from a denial of his first habeas corpus petition, this court determined that a disciplinary sanction violated his constitutional protection against compelled self-incrimination and reversed and remanded for a recalculation of his release date. *Johnson v. Fabian*, 711 N.W.2d 540, 540 (Minn. App. 2006), *aff'd in part and rev'd in part on other grounds*, 735 N.W.2d 295 (Minn. 2007).

The instant appeal involves appellant being placed on intensive supervised release (ISR) on 17 April 2006. Appellant violated the terms of his release in May 2006, was

rereleased and restructured 18 May 2006, and, after violating his restructure, was recommitted for 150 days beginning 28 June 2006.¹

On 9 April 2007, appellant was again placed on ISR. The terms of his ISR included: (1) strict house arrest for the first four months (“[w]hile on house restriction . . . [appellant] will remain in [his] residence all hours except those [he is] working or at another approved activity”); (2) “[appellant] will not leave the State of Minnesota without written approval from the agent/designee and then only under the terms and conditions prescribed in writing;” and (3) “[appellant] will keep the agent/designee informed of [his] activities.” On 12 April 2007, appellant was restructured for failing electronic monitoring and strict house arrest. Appellant was informed that “[a]ny further violations will result in a revocation hearing,” and he agreed to increase his communications with his agent.

One week later, during a home visit, appellant informed his agents that he had left the state of Minnesota that day as part of his new sales job and that he had done so without first obtaining permission from an agent. Appellant also reported that he received a ride from a woman without obtaining his agent’s permission and that he had told his agent he would be taking the bus and was allowed extra time to do so. Appellant was taken into custody.

On 26 April 2007, appellant was notified that a revocation hearing would be held on 1 May 2007. The Notice of Violation provided that at the hearing appellant had the right “[t]o present witnesses and any other evidence to: a. Help show that [he] did not

¹ The record does not clearly explain why appellant served more than 150 days.

violate [his] conditions of release. b. Show mitigating circumstances why [his] release should not be revoked.”

On 1 May 2007, the hearing officer revoked appellant’s release and imposed a 365-day recommit because he found appellant “unamenable to supervision and an ongoing risk to the public.” At the hearing, appellant acknowledged that he had accepted a ride from a woman without permission. He also admitted that he left the state without prior approval, but argued that he did not know he would be leaving the state because it was his first day of work, and he was a passenger in the vehicle and had “dozed off.” The hearing officer denied appellant’s request to offer corroborative testimony from the employee who trained him. Rather, the hearing officer “accepted the attorney’s information [regarding the proposed testimony] as true” but still found appellant to be in violation of his restructure because he had left the state without permission and failed to keep his agent informed of his activities. Appellant requested that the executive officer, hearings and release unit, of the department of corrections (DOC) review the hearing officer’s determination. On 18 July 2007, the executive officer “concluded that the record supports the hearing officer’s decision.”

On 28 August 2007, appellant petitioned for writ of habeas corpus alleging that (1) his confinement was unlawful and constituted cruel and unusual punishment; (2) the hearing officer’s denial of his request to present a witness and documentary evidence violated the Fifth and Fourteenth Amendments to the U.S. Constitution; (3) reliance on prior convictions as factors supporting the revocation violated the Fifth Amendment’s Double Jeopardy Clause and constituted cruel and unusual punishment; and (4) any DOC

officer should be barred from overseeing his revocation hearing due to conflict of interest because appellant had a suit against the DOC.

On 9 October 2007, the district court, having concluded that no evidentiary hearing was necessary to decide appellant's petition because "[t]here are no facts stated by [appellant] that are inconsistent with the facts as stated by the [r]espondent," summarily denied appellant's petition.

On 19 October 2007, appellant moved the district court to reconsider its decision pursuant to Minn. R. Gen. Pract. 115.11. Four days later, appellant moved to remove the district court judge based on claims of bias; on 25 October 2007, the district court denied the removal motion. On 26 October 2007, the district court denied appellant's motion to reconsider. This appeal follows, challenging the district court's denial of his writ of habeas corpus petition. During pendency of this appeal appellant was released from custody.²

² We note that, although not raised by either party, we have considered whether this appeal is moot. *See In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997) (stating that if, during appeal, an event occurs that makes decision on the merits unnecessary, appeal will be dismissed as moot). A case is moot if an appellate court "is unable to grant effectual relief." *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). But a case that otherwise may be deemed moot may be heard on appeal if there is "evidence that collateral consequences [may result] from a judgment." *In re McCaskill*, 603 N.W.2d 326, 329 (Minn. 1999). Although we cannot grant the relief typically given to a successful habeas petitioner—release—collateral consequences are possible because appellant has not been released unconditionally. *See* Minn. Stat. § 244.05, subd. 2 (2006) (explaining the commissioner has broad authority regarding supervised release); Minn. Stat. § 609.3455, subd. 8(b) (2006) (explaining the commissioner has broad authority when a sex offender is placed on conditional release following the completion of the supervised-release term).

DECISION

Appellant argues that the district court abused its discretion by denying his habeas corpus petition. We disagree.

“A person imprisoned or otherwise restrained of liberty . . . may apply for a writ of habeas corpus to obtain relief from imprisonment or restraint.” Minn. Stat. § 589.01 (2006). When reviewing a denial of a writ of habeas corpus petition, an appellate court gives the district court’s findings “great weight . . . and will uphold [its] findings if they are reasonably supported by the evidence.” *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. 17 Nov. 1998). Questions of law, however, are subject to de novo review. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. 15 Aug. 2006).

1. Due Process

Citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972), appellant argues that his due process rights were violated. Specifically, he argues that he was entitled to an evidentiary hearing to present a witness and documentary evidence. He also asserts that the district court’s reliance on *State ex rel Taylor v. Schoen*, 273 N.W.2d 612 (Minn. 1978), violated *Morrissey* and the Supremacy Clause. Finally, appellant asserts that the language on the notice of violation form gives him an absolute right to present witnesses.

Taylor is distinguishable; it outlines minimal due process standards in a parole-release-hearing context, which does not include the right to present witnesses. 272 N.W.2d at 617.

Once appellant admitted that he had violated his ISR, his due process rights under *Morrissey* were no longer implicated. The Supreme Court has determined that in the revocation-of-parole context, “the minimum requirements of due process [include the] opportunity to be heard in person and to present witnesses and documentary evidence.” *Morrissey*, 408 U.S. at 488-89, 92 S. Ct. at 2604. Appellant argues that his witness would have testified that appellant did not know that he was leaving Minnesota, and, therefore, he could not have given notice that he was doing so. But appellant’s arguments are based on his mistaken belief that the issue to be determined was whether he *knowingly* left Minnesota in violation of his ISR. Knowledge was not a factor. Moreover, the hearing officer accepted the proposed testimony as true. And, the procedural safeguards of *Morrissey* were not triggered: “If it is determined that petitioners admitted parole violations to the Parole Board, as respondents contend, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter.” *Id.* at 490, 92 S. Ct. at 2605. Appellant admitted his ISR violations.

Appellant also argues that he should have been permitted to submit various emails from his sister. Appellant explained that his sister “was in constant contact with agents before and after [he] was taken into custody. Therefore, she had knowledge and information that [he] did not even know about his agents.” Appellant cites *Gagnon v. Scarpelli* for the proposition that “we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.” 411 U.S. 778, 782 n.5, 93 S. Ct. 1756, 1760 n.5

(1973). But, again, none of this information could have refuted the controlling factor—that appellant admitted violating his ISR.

In habeas corpus proceedings, an evidentiary hearing is required “only if a factual dispute is shown by the petition.” *Seifert v. Erickson*, 420 N.W.2d 917, 920 (Minn. App. 1988), *review denied* (Minn. 18 May 1988). Appellant argues that there was a factual dispute regarding whether the agent knew of the nature of appellant’s employer’s business, and, therefore, should have been aware that appellant might leave Minnesota. Once again, the knowledge of the agent was not an issue because it was uncontroverted that appellant left Minnesota without first receiving permission from his agent. Given appellant’s admission of violations, the fact that he was not afforded an evidentiary hearing and allowed to present a witness or documentary evidence did not violate appellant’s due process rights under *Morrissey*.

2. Hearing Officer’s Findings

Appellant challenges several of the hearing officer’s findings. “In order to justify a revocation order all that is required is enough evidence, within a sound judicial discretion, to satisfy the district [court] that the conduct of the [releasee] has not met the conditions of the [ISR].” *United States v. Strada*, 503 F.2d 1081, 1085 (8th Cir. 1974) (quotation omitted). The district court concluded that because “[appellant] admitted to leaving the state without permission and accepting a ride from a woman . . . there is enough evidence . . . that [appellant] has not met the conditions of his supervised release.” In this context, because this ultimate finding that appellant violated the terms of

his ISR is unaffected by the errors claimed by appellant, it is unnecessary to address appellant's specific challenges.

3. Duration of Recommit

Appellant argues that the 365-day sanction was too long. We disagree. “‘Supervised release’ means that portion of a determinate sentence served by an inmate in the community under supervision and subject to prescribed rules, adopted in accordance with Minnesota Statutes, section 244.05.” Minn. R. 2940.0100, subp. 31 (2007). The legislature has directed that the department of corrections shall adopt by rule “‘standards and procedures for the revocation of supervised or conditional release, and shall specify the period of revocation for each violation of release.” Minn. Stat. § 244.05, subd. 2 (2006).

When an inmate violates the terms of his ISR, the commissioner of corrections “shall impose sanctions as provided in subdivision 3 and section 609.3445.” Minn. Stat. § 244.05, subd. 6 (2006); *see also* Minn. R. 2940.3600(C) (2007) (stating that “[v]iolation of any standard or special condition of parole or supervised release” is grounds for revocation of supervised release). The commissioner may “revoke the inmate’s supervised release and reimprison the inmate for the appropriate period of time.” Minn. Stat. § 244.05, subd. 3(2) (2006); *see also* Minn. R. 2940.3700 (2007) (explaining the only limitation in “appropriate” is that it “may not exceed the time remaining on the releasee’s sentence”). Given the severity of appellant’s initial offense and his numerous ISR violations, we conclude that the duration of appellant’s recommit was not an abuse of the commissioner’s broad discretion.

Finally, we decline to address appellant's arguments regarding the authority of the hearing officer to find him unamenable to supervision and calculation of jail credit because they were not raised below. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

4. Court Bias Claim

Appellant argues that the district court was biased, as demonstrated by denial of appellant's motion for removal. We disagree. First, the district court's 25 October 2007 order denying appellant's recusal motion is not an appealable order. *See* Minn. R. Civ. App. P. 103.03 (listing appealable judgments and orders). The proper procedure for challenging this order was to petition for prohibition, which appellant failed to do. *See State v. Cermak*, 350 N.W.2d 328, 331 (Minn. 1984); Minn. R. Civ. App. P. 120.01 (explaining how to file an extraordinary writ).

Second, even if the substance of appellant's argument is considered, it fails. When reviewing a claim of judicial bias, this court presumes that the judge discharged his judicial duties in a proper manner. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). "Prior adverse rulings by a judge, without more, do not constitute judicial bias." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). Here, appellant's claim of bias hinges on his claim that this district court judge was the same judge who denied his first habeas corpus petition, which was ultimately reversed in part by this court, and our

decision later affirmed by the Minnesota Supreme Court. This showing is insufficient because, without a showing other than adverse rulings, even repeated adverse rulings, appellant has not proved bias.

Affirmed.