STATE OF MINNESOTA
IN COURT OF APPEALS
A10-887

In the Matter of the Risk Level Determination of P. L.

Filed January 11, 2011
Dismissed
Johnson, Chief Judge

Department of Corrections
File No. 3-1100-17560-2

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Considered and decided by Toussaint, Presiding Judge; Johnson, Chief Judge; and Crippen, Judge.*

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

JOHNSON, Chief Judge

P.L. challenges an end-of-confinement review committee's determination that his risk level is III. He argues that the risk-level determination is invalid because he was transferred from one correctional facility to another correctional facility after the

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

determination but before his release from the second correctional facility. He argues that he should have received another risk-level determination from the end-of-confinement review committee at the correctional facility to which he was transferred. We decline to consider P.L.'s argument because P.L. presently is civilly committed, and this court's caselaw makes clear that the appeal is moot. Therefore, we dismiss the appeal.

FACTS

P.L.'s risk-level determination and his commitment are based, in part, on two convictions for criminal sexual conduct. In 1992, a Dakota County jury found him guilty of first-degree criminal sexual conduct. The district court sentenced him to 268 months of imprisonment. This court affirmed the conviction and sentence on direct appeal. In addition, in 1985, P.L. pleaded guilty to second-degree criminal sexual conduct in Ramsey County and was sentenced to 30 months of imprisonment.

In this appeal, P.L. seeks review of administrative proceedings that took place in 2006, when P.L. was confined by the department of corrections (DOC) at the Minnesota Correctional Facility in Moose Lake (MCF-ML). In March 2006, P.L. was due to be released from MCF-ML in August 2006. A DOC psychologist examined P.L. in preparation for his contemplated release, using the Minnesota Sex Offender Screening Tool – Revised. The psychologist recommended that the end-of-confinement review committee (ECRC) at MCF-ML assign P.L. a risk level of III because P.L.'s "past behavior raises concern that future sex offending behaviors could be of severe gravity." In May 2006, the MCF-ML ECRC assigned P.L. a risk level of III. Later that month, P.L.

filed an administrative appeal of his risk-level determination with the office of administrative hearings.

While the ECRC process was pending, MCF-ML officials charged P.L. with a violation of prison disciplinary rules because he threatened to harm contractors working at the prison. In May 2006, MCF-ML personnel conducted a disciplinary hearing and found P.L. guilty of violating prison disciplinary rules. In June 2006, DOC transferred P.L. from MCF-ML to the Minnesota Correctional Facility in Stillwater (MCF-STW) because of increased security concerns.

In August 2006, Dakota County petitioned to civilly commit P.L. as a sexually dangerous person and a sexual psychopathic personality. In September 2006, DOC placed P.L. on supervised release and transferred him from MCF-STW to the Minnesota Sex Offender Program at St. Peter (MSOP-St. Peter) pending the resolution of the civil commitment proceedings. But in October 2006, DOC revoked P.L.'s supervised release to MSOP-St. Peter because he attempted to "start a riot" among patients there. P.L. was returned to DOC custody until the completion of his sentence in September 2008.

In January 2008, the Dakota County District Court initially committed P.L. as a sexually dangerous person. This court affirmed. In May 2009, the district court indeterminately committed P.L. At the time of briefing in this appeal, P.L. was committed to the custody of the commissioner of human services and was at MSOP-ML.

P.L.'s administrative appeal of the MCF-ML ECRC's risk-level determination was consolidated with the appeals of 35 "similarly situated sex offenders who filed requests for administrative review of risk level assignments prior to their civil commitments." In June

2009, the MCF-ML ECRC moved to dismiss P.L.'s administrative appeal as moot on the ground that he was not released from confinement and remains committed and, thus, will not suffer any harm from community notification or any other disclosure of his risk-level determination. In October 2009, an administrative law judge (ALJ) denied the ECRC's motion with respect to two other sex offenders, reasoning that the risk-level appeals were not rendered moot by the civil commitment of the sex offenders. It appears that the ALJ's ruling in those two cases resolved the issue for all 36 consolidated cases.

In March 2010, a different ALJ held a hearing on the merits of P.L.'s administrative appeal of his 2006 risk-level determination by the ECRC at MCF-ML. In April 2010, the ALJ concluded that the ECRC did not err by assigning P.L. a risk level of III and, accordingly, affirmed. The ALJ reasoned that Minn. Stat. § 244.052 (2008) did not entitle P.L. to another risk-level determination after his transfer from MCF-ML to MCF-STW. P.L. appeals by way of a writ of certiorari.

D E C I S I O N

P.L. argues that the ALJ erred in affirming his risk-level determination because the end-of-confinement review committee at MCF-STW was required to conduct another risk-level determination.

Before considering P.L.'s argument, we must assure ourselves that a justiciable controversy exists. In their briefs to this court, neither P.L. nor the MFC-ML ECRC raised the issue of mootness. Nonetheless, we must raise the issue *sua sponte* if it appears that a case may be moot. *See City of W. St. Paul v. Krengel*, 768 N.W.2d 352, 355 n.2 (Minn. 2009).

A justiciable controversy "involves definite and concrete assertions of right," *In re J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008), and "allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts," *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). Appellate courts "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). A case is moot if an event resolves the dispute or makes it impossible for a court to grant relief. *Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005). If a case is moot, there is no justiciable controversy, *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005), and the case must be dismissed, except in certain "narrowly-defined circumstances." *Sviggum*, 732 N.W.2d at 321. There are two exceptions to the mootness doctrine. A matter will not be dismissed as moot if (1) the issue raised is capable of repetition yet would evade review or (2) collateral consequences attach to the otherwise moot ruling. *McCaskill*, 603 N.W.2d at 327.

The ALJ presiding over the 36 consolidated cases denied the MFC-ML ECRC's motion to dismiss the case as moot. The motion was based on this court's opinion in *In re J.V.*, in which we considered facts that are practically identical to the facts of the present case. The relator in *J.V.* sought appellate review of his risk-level determination after he was civilly committed to MSOP. 741 N.W.2d at 614. We concluded in part B of our opinion that the case was moot because J.V. was not subject to community notification and because DOC was prohibited from releasing his risk level to the community so long as he was committed to MSOP-St. Peter. *Id.* at 615 (citing Minn. Stat. § 244.052, subd. 4(b)(3)).

In addition, in part C of our opinion, we rejected J.V.'s argument that his risk-level determination was capable of repetition in a way that would evade review. *Id.* at 615-16. We reasoned that J.V. would receive a new ECRC risk-level determination prior to his release from civil commitment and then would have the right to request administrative review of that determination and appellate review of an ALJ's decision. *Id.* at 616.

The ALJ analyzed the detailed arguments presented by the parties and concluded, consistent with *J.V.*, that the 36 predatory offenders are not at risk of injury by disclosure of their risk level so long as they are civilly committed at MSOP-St. Peter. That part of the ALJ's analysis was correct. When the ECRC assigned P.L. a risk level in May 2006, DOC was preparing to place P.L. on supervised release. But P.L. was initially committed in January 2008 and was committed on an indeterminate basis in May 2009. The district court's orders of commitment changed P.L.'s circumstances such that he no longer is at risk of injury arising from his risk-level determination. Thus, P.L.'s challenge to his risk-level determination became moot when he was committed. *See id.*

Nonetheless, the ALJ denied the ECRC's motion to dismiss based on the first exception to the mootness doctrine, that the issue in dispute is capable of repetition in a way that would evade review. *See McCaskill*, 603 N.W.2d at 328. The ALJ noted that, contrary to this court's "assumption" in *J.V.*, DOC "does not interpret Minn. Stat. § 244.052 as requiring it to provide offenders with new ECRC risk level determinations prior to their release." The ALJ stated that DOC interprets section 244.052 as requiring it to convene an ECRC only once before an offender's release from a state correctional

facility or a state treatment program. In light of this premise, the ALJ concluded that the consolidated administrative appeals were not moot.

We have sought to reconcile this part of the ALJ's analysis with part C of our opinion in *J.V.* The written record of proceedings before the ALJ does not sufficiently explain the matter. The MCF-ML ECRC relied on *J.V.* in its written motion to dismiss, without qualification and without questioning the premise that all civilly committed persons receive a risk-level determination at least 90 days before being released from commitment. *See* Minn. Stat. § 244.052, subd. 3(d)(i) (2008). The MCF-ML ECRC did not thereafter file any supplemental motion papers. We can only speculate that counsel for the MCF-ML ECRC orally informed the ALJ of additional information concerning DOC's position as to whether a civilly committed person is entitled to another risk-level determination before being released from commitment. At oral argument in this appeal, we inquired into the source of the information on which the ALJ relied. Appellate counsel for the MCF-ML ECRC was not involved at the administrative stage and, thus, did not know the bases of DOC's position or how it was presented to the ALJ. P.L.'s appellate counsel, who also was not involved in the administrative proceedings, also was unable to explain the bases of DOC's position. In light of part C of this court's opinion in *J.V.*, we do not understand how DOC could interpret section 244.052 in the manner described in the ALJ's decision. There we said, "Prior to his release from MSH-St. Peter, relator will have a new ECRC risk level determination that will trigger his right to request administrative review under the statute." *J.V.*, 741 N.W.2d at 616. If DOC wishes to modify the existing caselaw, the appropriate forum is the supreme court.

To determine whether there is a justiciable controversy, we must apply the relevant caselaw, and *J.V.* is on point. We are not constrained by DOC's position on the meaning of section 244.052. *See Kaplan v. Washington Cnty. Cmty. Soc. Servs.*, 494 N.W.2d 487, 489 (Minn. App. 1993) (stating that court need not defer to agency determinations on questions of statutory interpretation) (citations omitted). To the contrary, DOC is bound by this court's opinion in *J.V.*, as is the ALJ, as is this court. *See State v. Ross*, 732 N.W.2d 274, 280 (Minn. 2007) (discussing doctrine of *stare decisis*). Given the information presently available, we conclude that the ALJ's analysis of the first exception to the mootness doctrine is inconsistent with part C of *J.V.* Furthermore, even if P.L.'s arguments to the ALJ were within the capable-of-repetition exception at the time of the administrative proceedings, his sole argument on appeal would not be capable of repetition. P.L. argues that his risk level was assigned erroneously only because he subsequently was transferred from MCF-ML to MCF-STW. There is no apparent reason why P.L. might be subjected to the same allegedly erroneous procedure in the future; *i.e.*, there is no apparent reason why he might be transferred from one facility to another facility within 90 days of the end of his confinement.[1]

[1]We acknowledge that, when discussing the capable-of-repetition exception, courts often consider the possibility that an issue will arise again in cases brought by persons other than present parties. *See Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 903 (Minn. 1996); *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989); *State ex. rel. Doe v. Madonna*, 295 N.W.2d 356, 361 (Minn. 1980). But the *J.V.* opinion takes a narrower approach that focuses solely on the party appearing before the court. *See J.V.*, 741 N.W.2d at 616. Even if we were to take the broader approach, the issue raised by P.L. on appeal would not necessarily evade review because it could be pursued by a person who is not civilly committed after his release from prison. We also note that mootness is "a flexible, discretionary doctrine." *Kahn*, 701 N.W.2d at 821 (quotation omitted).

At oral argument, P.L.'s counsel invoked the second exception to mootness and asserted two reasons why the risk-level determination of the MCF-ML ECRC would have collateral consequences. First, P.L.'s counsel argued that P.L.'s risk-level determination will affect the programming he receives while he is civilly committed. In support of this argument, counsel cited *In re D.W.*, 766 N.W.2d 365 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). D.W. had been civilly committed for 15 years and "had reached the final inpatient phase of MSOP and was assigned to participate in the supervised integration program (MSI)." *Id.* at 366. A risk-level determination by an ECRC was "a condition of [D.W.'s] participation in MSI." *Id.* In contrast, P.L. has not been assigned to participate in the MSI program and has not demonstrated that he is likely to be assigned to the MSI program in the near future. We presume that, if he were so assigned, he would be required to undergo another risk-level determination at that time. *See J.V.*, 741 N.W.2d at 614. Thus, *D.W.* does not support P.L.'s argument for an exception to the mootness doctrine.

Second, P.L.'s counsel argued that his risk-level determination will cause a stigma to attach to him. In support of that argument, she cited *In re C.M.*, 578 N.W.2d 391 (Minn. App. 1998). In *C.M.*, this court considered whether stigma arising from community notification following a person's release may give rise to a liberty interest that is protected by the due process guarantees of the federal and state constitutions. *Id.* at 396-98. But P.L. has not been released to the community, and he has not made a due process argument. In addition, as stated above, we must presume that he will receive another risk-level

determination before being released from commitment. *See J.V.*, 741 N.W.2d at 614. Thus, *C.M.* does not support P.L.'s argument for an exception to the mootness doctrine.

In sum, we conclude that P.L.'s appeal is moot. Accordingly, we may not consider P.L.'s argument that the risk-level determination he received from the ECRC at MCF-ML is invalid.

Dismissed.