

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1283**

State of Minnesota ex rel.
Timothy Costello, petitioner,
Appellant,

vs.

Tom Roy, Commissioner of Corrections,
Respondent.

**Filed October 31, 2011
Affirmed
Johnson, Chief Judge**

Chisago County District Court
File No. 13-CV-11-599

Daniel J. Cragg, Eckland & Blando, LLP, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, St. Paul, Minnesota; and

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

Considered and decided by Johnson, Chief Judge; Halbrooks, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Timothy Costello is incarcerated at the Minnesota Correctional Facility in Rush City. He challenges the decision of the prison's Hearings and Release Unit (HRU) to extend his projected release date to the expiration of his sentence in May 2014. The district court denied Costello's petition for a writ of habeas corpus, which sought relief on three independent grounds. We affirm.

FACTS

In October 2007, the district court revoked Costello's probation, which had been imposed for a conviction of first-degree driving while impaired, and executed his sentence of 36 months of imprisonment. In May 2009, he was placed on supervised release, on the conditions, among others, that he not use or possess alcohol and that he comply with chemical dependency (CD) programming, as directed by his probation officer.

In January 2010, police officers visited Costello's home in response to a report of a domestic disturbance. One of the officers later testified that Costello "was slurring his words and swaying back and forth." The officer also testified that Costello admitted that he had been drinking that day because he was celebrating his completion of CD treatment.

In February 2010, the commissioner of corrections alleged that Costello had committed two violations of the terms of his supervised release: use of alcohol and failure to report contact with law enforcement. An HRU officer (HRO) conducted an

evidentiary hearing on February 25, 2010, at which Costello was represented by counsel. The HRO found that Costello had violated the terms of his supervised release and sanctioned Costello by assigning him 365 additional days of incarceration. As a consequence of the HRO's decision, Costello was due to be released and placed on supervised release for a second time on February 14, 2011, which was one year after his arrest. The HRO's written decision "directs [Costello] to complete chemical dependency treatment during this period of incarceration if determined to be eligible within current [DOC CD] treatment procedure and criteria." The HRO's decision also states, "It is the intent of this hearing officer that [Costello] successfully complete chemical dependency treatment prior to his release."

In March 2010, Costello entered a CD treatment program at the prison. On July 26, 2010, a review hearing was held before a second HRO on the recommendation that Costello's treatment be terminated. The matter was continued for 30 days to allow for consultation with an executive officer of the HRU. On August 23, 2010, a third HRO reaffirmed the treatment directive issued in February 2010. The HRO's written decision states: "The original treatment directive was to complete chemical dependency treatment programming before any release. There is no provision for release without treatment completion. HRU reaffirms the original treatment directive." Costello's projected release date remained February 14, 2011.

On November 18, 2010, Costello was again admitted to an in-prison treatment program. But he withdrew from the program the following day. On November 29, 2010, a review hearing was held before a fourth HRO. The HRO's written decision states that

Costello “stated that he can secure in-patient CD treatment in the community with a halfway house placement within one month.” The HRO’s written decision further states:

HRU will allow the offender a period of time, to attempt to secure in-patient CD treatment in the community. If the offender is able to accomplish this task, HRU will review again and determine if this placement is suitable. HRU made no promises to the offender and informed him that his directive to complete CD treatment in the institution is still in effect. However, if he secures in-patient CD treatment in the community, HRU will review and consider his request to complete CD treatment in the community.

Again, Costello’s projected release date remained February 14, 2011.

On January 10, 2011, approximately one month before Costello’s projected release date, the second HRO conducted another review hearing. Costello’s case manager stated that Costello was given 30 days to find treatment in the community but had not done so. The HRO heard testimony, apparently from prison staff, that Costello was not encouraged to leave the prison’s treatment program in November 2010 and made that decision voluntarily. The HRO assigned Costello an additional 180 days of accountability time, thereby extending his projected release date to August 14, 2011. The HRO reiterated the requirement that Costello complete treatment. The HRO’s written decision notes that Costello’s case manager was pursuing the possibility of a 90-day treatment program at the Minnesota Correctional Facility in Lino Lakes.

On April 15, 2011, a fifth HRO conducted another review hearing. The HRO continued the matter for 30 days. The HRO stated that Costello “is expected to apply to all of the Department’s chemical dependency programs.” The HRO reiterated the

statement that Costello “would not be released prior to expiration if he did not complete CD treatment.”

On May 6, 2011, a sixth HRO conducted another review hearing. The HRO reviewed the highlights of the previous review hearings and stated, “There are no treatment programs that are willing to accept the offender at this time.” Accordingly, the HRO determined that Costello’s projected release date would be extended to the expiration of his sentence on May 27, 2014. The HRO reasoned as follows:

At this time, the offender has yet to comply with the original directive. Today’s decision is to assign expiration of sentence. His actions caused him to be denied into a treatment program and I find no reason to begin release planning because of that decision. Release planning can begin if he complies with the original directive. HRU will not re-visit another request to complete treatment in the community.

On May 16, 2011, Costello filed a petition for a writ of habeas corpus in the Chisago County District Court. In an accompanying memorandum, Costello’s attorney argued that the petition should be granted and the writ issued for three reasons: (1) Costello had served all of the 365 days of accountability time that were assigned at the February 25, 2010 review hearing; (2) he was deprived of his right to the effective assistance of counsel at the February 25, 2010 review hearing; and (3) the HRO’s decision following the May 16, 2011 review hearing violates his right to substantive due process. In July 2011, the district court issued a ten-page order and memorandum in which it denied the petition. Costello appeals.

DECISION

Costello argues that the district court erred by denying his petition for a writ of habeas corpus. A writ of habeas corpus is a statutory remedy that allows a person to seek “relief from imprisonment or restraint,” Minn. Stat. § 589.01 (2006), in situations in which the postconviction remedy is inapplicable, *Kelsey v. State*, 283 N.W.2d 892, 894-95 (Minn. 1979). We apply a *de novo* standard of review to questions of law, and we review a district court’s findings of fact to determine whether “they are reasonably supported by the evidence.” *Roth v. Commissioner of Corrections*, 759 N.W.2d 224, 227 (Minn. App. 2008) (quotation omitted).

I. Projected Release Date

Costello first argues that the district court erred by rejecting his first claim for relief, that he had served all of the 365 days of accountability that were assigned to him at the February 25, 2010 review hearing.

Costello’s first claim is, in essence, an argument that the HRO misinterpreted and misapplied administrative rules that have been promulgated by the Department of Corrections, namely, Minn. Rule 2940.3800. In its responsive brief, the commissioner argues that Costello’s first claim is not cognizable on a petition for a writ of habeas corpus. The commissioner is correct. This court recently held that a petition for a writ of habeas corpus may be used to obtain relief only for constitutional violations or jurisdictional defects, not for violations of statutes or other sources of law. *Beaulieu v. Minnesota Dep’t of Human Servs.*, 798 N.W.2d 542, 547-48 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). In his reply brief, Costello argues that the holding in

Beaulieu is limited to habeas petitions that constitute a collateral attack on a prior judgment. But the language of the *Beaulieu* opinion, which concerned a challenge to an order for civil commitment, is not limited to collateral attacks. The *Beaulieu* opinion discusses the history of habeas corpus in Minnesota since the 1960s and concludes that “the supreme court regards habeas as a remedy only for a jurisdictional defect or a constitutional violation.” *Id.* at 547. Thus, we conclude that Costello’s first claim is not properly within the scope of habeas relief.

Even if we were to assume that Costello’s first claim is cognizable in a habeas proceeding, we nonetheless would conclude that the claim would fail on the merits. He argues that he served all of the additional accountability time that was assigned to him in February 2010. His argument fails to acknowledge that, in May 2011, an HRO extended his projected release date to the expiration of his sentence, in May 2014. The implication of Costello’s argument is that the HRO was not permitted to extend the projected release date in May 2011 beyond the 365 days that were assigned in February 2010.

The commissioner responds by arguing that the HROs’ decisions were properly based on the administrative rule governing the revocation of supervised release, which provides as follows:

Offenders who have violated the conditions of parole or supervised release and who have been returned to institutional status shall be assigned a release date and a term of reimprisonment, as follows:

A. up to six months . . . for violations of conditions of . . . supervised release other than convictions of or involvement in criminal activity;

B. up to six months for convictions of misdemeanors or gross misdemeanors;

C. six months to expiration of sentence for conviction of a felony; and

D. depending on the time remaining to be served on the sentence, the type of violation, and the needs of the offender, up to expiration of the sentence may be assigned as the term of reimprisonment if there is a finding of risk to the public or if repeated violations of the conditions of release occur and the releasee is determined to be unamenable to supervision by the executive officer of hearings and release.

Minn. R. 2940.3800 (2009). Specifically, the commissioner contends that this rule permits an HRO to extend a projected release date on more than one occasion. The commissioner is correct that there is nothing in the text of the rule stating that an HRO may not extend a projected release date more than once. Paragraph D of the rule provides an HRO with flexibility to extend a term of reimprisonment up to the expiration of sentence, if there is a finding of risk to the public. The HRO made such a finding, in writing, following the February 25, 2010 review hearing.

An agency's interpretation of its own rule enjoys considerable deference and should be upheld if it is reasonable. *St. Otto's Home v. Minnesota Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). "If there is room for two opinions on a matter," an agency's decision "is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn. 2009). Accordingly, an agency's interpretation of an administrative rule may not be overturned merely because the interpretation is viewed as "harsh or undesirable," *Mammenga v. Minnesota Dep't of*

Human Servs., 442 N.W.2d 786, 789 (Minn. 1989), or “draconian,” *Hy-Vee Food Stores, Inc. v. Minnesota Dep’t of Health*, 705 N.W.2d 181, 190 (Minn. 2005). In this case, Costello has not persuaded this court that the HRU misinterpreted or misapplied the applicable administrative rule.

Thus, even if Costello’s first claim were cognizable in a habeas proceeding, he has failed to show that he would be entitled to habeas relief.

II. Claim of Ineffective Assistance of Counsel

Costello next argues that the district court erred by rejecting his second claim for relief, that he was deprived of his right to the effective assistance of counsel at the February 25, 2010 review hearing.

Caselaw interpreting the United States Constitution provides that a person may have a due process right to counsel in a parole-revocation hearing on “a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.” *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 1763 (1973); *see also State ex rel. Taylor v. Schoen*, 273 N.W.2d 612, 617 (Minn. 1978). In this case, Costello was represented at the February 25, 2010 HRU hearing by a public defender. The commissioner does not question that Costello had a constitutional right to counsel.

The parties assume that we should apply the caselaw concerning the Sixth Amendment right to the effective assistance of counsel. Thus, to prevail on his second claim, Costello would need to prove, first, that “his counsel’s representation ‘fell below an objective standard of reasonableness’” and, second, that “‘there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Costello contends that his counsel's representation failed to meet an "objective standard of reasonableness" because, at the February 25, 2010 hearing, he did not cross-examine the police officer about his testimony that Costello consumed alcohol on January 29, 2010. More specifically, Costello contends that his attorney should have cross-examined the officer about "the complete absence of any physical evidence" of his alcohol use because there was "[n]o PBT, Intoxilyzer, blood test, [or] any other scientific process" that would tend to prove that Costello had consumed alcohol.

Costello has not obtained and submitted a transcript of the February 25 hearing, which would allow this court to assess his attorney's performance. It is Costello's responsibility as appellant to present a record adequate to support his arguments on appeal. *See State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984). In addition, the decision to not cross-examine the officer appears to be a matter of trial strategy, which is presumed not to be unreasonable, unless extraordinary circumstances are shown. *See Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010); *Cooper v. State*, 565 N.W.2d 27, 33 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). For these reasons, Costello cannot satisfy the first prong of the *Strickland* test.

Furthermore, Costello cannot satisfy the second prong of the *Strickland* test because he cannot prove that cross-examination would have changed the outcome of the proceeding. Costello and his wife testified that he had not been drinking. But the HRO

found, based on the police officer's testimony, that Costello "was slurring his words and swaying back and forth," and further found that Costello admitted to the officer that he had been drinking. The HRO was confronted with an obvious credibility issue. The HRO undoubtedly was aware that there was no physical evidence to corroborate the officer's testimony. The HRO noted that "[t]he officer has had numerous interactions with intoxicated people and is specially trained to observe and detect individuals under the influence." Costello does not identify any particular reason why the HRO would have made different findings if he had been reminded by Costello's attorney that there was an absence of physical evidence of alcohol use.

Thus, Costello has failed to show that he is entitled to habeas relief on his second claim.

III. Substantive Due Process

Costello last argues that the district court erred by rejecting his third claim for relief, that the HRO's decision following the May 6, 2011, review hearing violates his right to substantive due process.

The doctrine of substantive due process is based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See* U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. The doctrine "protects individuals from certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quotations omitted). The supreme court recently noted that "courts are 'reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in

this unchartered area are scarce and open-ended.”” *State v. Netland*, 762 N.W.2d 202, 208 (Minn. 2009) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992)).

The mode of analyzing a claim of substantive due process depends initially on whether there is a fundamental right at stake. If so, “the state must show that its action serves a compelling government interest.” *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998) (citing *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994)), *review denied* (Minn. Nov. 17, 1998). If not, “we review the state’s action to determine whether it is arbitrary or capricious and whether it is rationally related to a legitimate government interest.” *Id.* (citing *State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997)). Not every extension of imprisonment implicates a fundamental right. *See id.* (holding that failure to release offender on supervised release date due to loss of early-release privileges did not violate fundamental right). Costello does not cite any authority squarely holding that freedom from extended incarceration is a “fundamental right” for purposes of substantive due process. The general rule appears to be that a criminal offender does not have a fundamental interest in freedom from extended supervision. *See Bailey v. Gardebring*, 940 F.2d 1150, 1157 (8th Cir. 1991). Thus, we conclude that Costello does not have a fundamental right at stake in this case. Accordingly, the relevant questions are whether the HRU’s actions were arbitrary or capricious and whether they were rationally related to a legitimate government interest. *See Northwest*, 583 N.W.2d at 591.

Costello contends that the HRO’s May 2011 decision was arbitrary and capricious because his projected release date was extended due to his failure to complete treatment,

yet the commissioner will not allow him to participate in a treatment program. Costello cannot satisfy his burden of proof on these facts. The HRO's May 6, 2011 decision noted that Costello had failed to "comply with the original directive" to complete CD treatment. The HRU had reiterated several times Costello's obligation to complete treatment, yet he failed to do so. As the commissioner argues, it was Costello's *past* failures to complete a treatment program, including his voluntary decision to discontinue the in-prison program in November 2010, that was the cause of the extension of Costello's projected release date, not the *present* unavailability of treatment in May 2011. The HRO's May 2011 decision did not foreclose the possibility that Costello would be admitted into a DOC program at some later time. In fact, the decision contemplated that possibility by providing that the HRU would begin planning for Costello's release if and when he completed treatment. The decisions of the HROs are well documented and reflect the commissioner's legitimate interest in rehabilitating criminal offenders and ensuring that they abide by the terms of their supervised release. Accordingly, Costello has not shown that the HRO's May 2011 decision was arbitrary or capricious or that it was not rationally related to a legitimate government interest. *See Northwest*, 583 N.W.2d at 591. Thus, Costello has failed to show that he is entitled to habeas relief on his third claim.

In sum, the district court did not err by denying Costello's petition for a writ of habeas corpus.

Affirmed.