STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0787

Vernon J. Bushey, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 29, 2008
Affirmed
Halbrooks, Judge

St. Louis County District Court
File No. 69-K5-03-100123

Vernon J. Bushey, OID #128204, MCF-Stillwater, 970 Pickett Street North, Bayport, MN 55003 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie Ford, St. Louis County Attorney, Karl Gregory Sundquist, Assistant County Attorney, St. Louis County Courthouse, 300 Fifth Avenue South, Virginia, MN 55792 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant challenges the denial of his petition for postconviction relief on the ground that the five-year conditional-release portion of his sentence is unconstitutional. Because we conclude that the five-year conditional-release portion of appellant's sentence is constitutional and the district court did not abuse its discretion in denying appellant's postconviction petition, we affirm.

FACTS

Appellant Vernon J. Bushey pleaded guilty to first-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subd. 1(5) (2002). Appellant's plea agreement called for the state to abide by the presentence investigation and the Minnesota Sentencing Guidelines. The guidelines provided a presumptive 54-month prison sentence. The sentencing worksheet stated that a five-year conditional-release term would be imposed pursuant to Minn. Stat. § 169A.276, subd. 1(d) (2002), with the execution of the sentence. The district court sentenced appellant to 51 months. After receiving a letter from the Minnesota Department of Corrections questioning the omission of the required conditional release, the district court issued an amended judgment that included a five-year conditional-release period.

Appellant petitioned the district court for postconviction relief. In his petition, appellant alleged that the five-year conditional-release term of his sentence violated the Double Jeopardy Clauses the United States and Minnesota Constitutions and constituted a bill of attainder. Appellant also argued that the five-year conditional-release constituted

an upward departure in his sentence without a jury determination. Appellant did not request an evidentiary hearing. The district court denied appellant's postconviction petition. This appeal follows.

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). The petitioner bears the burden of establishing, by a fair preponderance of the evidence, facts which warrant relief in a postconviction petition. *State v. Warren*, 592 N.W.2d 440, 449 (Minn. 1999). No hearing on the petition is required if the petition, files, and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2002). On appeal, this court reviews the record to determine whether there are sufficient facts to sustain the postconviction court's findings. *Warren*, 592 N.W.2d at 449. We will not disturb those findings absent an abuse of discretion. *Id.* at 450.

Appellant, pro se, argues that the district court erred in denying his postconviction petition because the imposed five-year conditional-release term violates the Double Jeopardy Clause of the United States and Minnesota Constitutions. The Double Jeopardy Clauses protect a criminal defendant from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Hanson*, 543

N.W.2d 84, 86 (Minn. 1996).[1] When the punishment imposed is mandatory at the time of sentencing, there is no double-jeopardy violation. *State v. Calmes*, 632 N.W.2d 641, 649 (Minn. 2002); *see also State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998) (an imposition of a conditional-release term does not violate the Double Jeopardy Clause even when it is imposed after sentencing and increases the length of the sentence).

Appellant characterizes the conditional-release term as a second punishment for a single offense. Appellant initially pleaded guilty to first-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .24 (2002). Sections 169A.20 and 169A.24 require the district court to impose the mandatory penalties listed in Minn. Stat. § 169A.276 (2002) when a person is convicted of first-degree DWI. Minn. Stat. § 169A.276, subd. 1(d), provides:

> [W]hen the court commits a person to the custody of the commissioner of corrections under this subdivision, it shall provide that after the person has been released from prison the commissioner shall place the person on conditional-release for five-years. The commissioner shall impose any conditions of release that the commissioner deems appropriate including, but not limited to, successful completion of an intensive probation program as described in section 169A.74 (pilot programs of intensive probation for repeat DWI offenders). If the person fails to comply with any condition of release, the commissioner may revoke the person's conditional-release and order the person to serve all or part of the remaining portion of the conditional-release term in prison. The commissioner may not dismiss the person

[1] We are also cognizant that Minn. Stat. §590.05 (Supp. 2007) provides an indigent defendant with the right to counsel for a postconviction challenge when the appellant has not already had a direct appeal from the conviction. Although the record does not demonstrate whether the court administrator forwarded a copy of appellant's postconviction petition to the state public defender as required by Minn. Stat. § 590.02, subd. 1(4) (2006), because appellant has not raised this issue we decline to address it.

> from supervision before the conditional-release term expires. Except as otherwise provided in this section, conditional-release is governed by provisions relating to supervised release. The failure of a court to direct the commissioner of corrections to place the person on conditional-release, as required in this paragraph, does not affect the applicability of the conditional-release provisions to the person.

By its plain language, section 169A.276 requires a district court to impose a five-year conditional-release term when there is a commitment to the Commissioner of Corrections. Minn. Stat. § 169A.276, subd. 1(d).

Appellant was notified of the conditional-release term through his sentencing worksheet. Although the initial sentencing did not include the conditional-release period, the statute, itself, states that a failure to direct the Commissioner of Corrections to place the offender on conditional release does not affect the applicability of conditional release to that offender. *See id.* After the district court was informed of the omission of a conditional-release term, it issued an amended sentencing judgment, which contains the required five-year conditional release and follows the requirements of section 169A.276.

Appellant's sentence was imposed according to the statutory requirements of sections 169A.24 and 169A.276. Because the executed sentence and conditional-release period constitute one punishment for the same offense, there is no violation of the Double Jeopardy Clause. Although imposition of the conditional-release term results in a sentence longer than the 51 months in prison, the district court did not abuse its discretion by imposing it. *Calmes*, 632 N.W.2d at 649.

Appellant also argues that the statutory requirement of a conditional-release term constitutes a bill of attainder in violation of the Minnesota Constitution. In a challenge to

a statute, we must invoke every presumption in favor of the constitutionality of the statute and only declare a statute unconstitutional when absolutely necessary and with extreme caution. *Council of Indep. Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300, 305 (Minn. 2005).

A bill of attainder is prohibited by Minn. Const. art. I, § 11. As defined, a bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Reserve Mining Co. v. State*, 310 N.W.2d 487, 490 (Minn. 1981). A statute operates as a bill of attainder when it (1) specifically singles out an identifiable individual or group, (2) inflicts punishment, and (3) does so without any judicial authority. *Id.*

Appellant contends that the conditional-release term was added to his sentence as an automatic punishment without a judicial determination regarding the term. The sentencing worksheet that was compiled prior to appellant's decision to plead guilty provided appellant with notice that the conditional-release term would be included in his sentence; Minn. Stat. § 169A.276, subd. 1(d), mandates a five-year conditional-release term in all first-degree felony DWI convictions that result in an executed sentence to the Commissioner of Corrections. *See* Minn. Stat. §§ 169A.24, .276. And a judicial determination was made when the district court executed his sentence. Appellant had an opportunity for judicial review, and he chose to accept a plea agreement that included the terms of the sentencing worksheet. The statute allows a district court to make an individual determination and order a sentence appropriately within its discretion. *See id.* That discretion was exercised appropriately here.

Finally, appellant argues that imposition of the five-year conditional-release term constitutes an upward departure in his sentence that requires a jury's determination based on proof beyond a reasonable doubt. But as discussed above, the conditional-release term is mandatory and is ordered in any conviction for first-degree DWI that results in a commitment to the Commissioner of Corrections. There are no aggravating factors that need to be proved to apply the conditional-release term. Therefore, appellant's argument on this issue lacks merit.

Affirmed.