STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1886

Peter Gerard Lonergan, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed June 22, 2010
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. 19HA-CV-08-4980

Peter Gerard Lonergan, Moose Lake, Minnesota (pro se appellant)

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

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

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross, Judge.

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

KALITOWSKI, Judge

Pro se appellant Peter Gerard Lonergan challenges the district court's dismissal of his petition for writ of habeas corpus, arguing that the district court erred by (1) failing to conclude that appellant's intensive supervised release (ISR) violates the prohibition

against ex post facto laws; (2) failing to hold that the "good time" appellant earned in prison was a liberty interest that is violated by his assignment to ISR; and (3) failing to consider whether appellant must abide by the conditions of release that he refused to sign. We affirm.

D E C I S I O N

A writ of habeas corpus is a statutory remedy available "to obtain relief from imprisonment or restraint." Minn. Stat. § 589.01 (2008). "A writ of habeas corpus may also be used to raise claims involving fundamental constitutional rights and significant restraints on a defendant's liberty or to challenge the conditions of confinement." *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26-27 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006). In considering a petition for a writ of habeas corpus, we defer to the district court's findings and will uphold them as long as they are reasonably supported by the evidence. *Nw. v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). But we review questions of law de novo. *Id*.

I.

Although appellant raised an ex post facto challenge to the district court, the district court did not address the issue. We generally do not address issues not decided by the district court. *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 911 (Minn. App. 2009). But if an issue was argued extensively to both the district court and this court and it may be dispositive, this court may address it in the interest of justice. *See* Minn. R. Civ. App. P. 103.04 (providing scope of review); *Kunza v. St. Mary's Reg. Health Ctr.*, 747 N.W.2d 586, 589-90 (Minn. App. 2008) (discussing well-established exception that

an appellate court may consider an issue not decided below if it is dispositive, and if, among other factors, it played a prominent role in briefing).

"Both the United States and Minnesota Constitutions prohibit the enactment of ex post facto laws." *State v. Manning*, 532 N.W.2d 244, 247 (Minn. App. 1995), *review denied* (Minn. July 20, 1995); *see* U.S. Const. art. I, § 10; Minn. Const. art. I, § 11. "An ex post facto law renders an act punishable in a manner in which it was not punishable when it was committed." *Id.* (quotation omitted). Appellant claims his assignment to ISR violates the constitutional prohibition against ex post facto laws because the ISR program did not exist when he allegedly committed his crime. We disagree.

Under the statute in effect when appellant committed his offense, the commissioner had the authority to assign an offender to ISR for all or part of the offender's supervised-release term. Minn. Stat. § 244.05, subd. 6 (1990) ("The commissioner may order that an inmate be placed on intensive community supervision . . . for all or part of the inmate's supervised release term."). Thus, the assertion that the ISR policy was modified following appellant's conviction is insufficient to establish a violation of the prohibition against ex post facto laws. *See Chauvin v. Erickson*, 998 F.2d 617, 619 (8th Cir. 1993) (concluding that new rule requiring inmate to work to earn good time is not ex post facto law when prior regulations allowed discipline for refusing a work order). We conclude that the ISR statutes at issue are not ex post facto in nature.

II.

Appellant argues that the district court erred by failing to recognize that because the "good time" he earned in prison was a state-created liberty interest, his assignment to ISR violates his right to due process. We disagree.

In a due-process analysis, we ask two questions: (1) does the complainant have a property or liberty interest with which the state has interfered, and (2) if so, were the procedures protecting that interest constitutionally sufficient. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904 (1989); *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). "Without a protected interest, the government has no constitutional obligation to provide due process." *Phillips v. State*, 725 N.W.2d 778, 782-83 (Minn. App. 2007) (citing *Singleton v. Cecil*, 155 F.3d 983, 987 (8th Cir. 1998)), *review denied* (Minn. Mar. 28, 2007). In determining whether a liberty interest exists, we "look to the nature of an interest to determine if it is within the scope of the Fourteenth Amendment's protection of liberty and property." *Carrillo*, 701 N.W.2d at 768. "A constitutionally-protected liberty interest arises from a legitimate claim of entitlement rather than simply an abstract need or desire or a unilateral expectation." *Id*. Thus, appellant must have a legitimate claim of entitlement to having his accrued good time not be served on ISR before his interest can qualify as a protected liberty interest.

Because appellant was sentenced after May 1, 1980, for a crime committed before August 1, 1993, he was entitled to have his sentence "reduced in duration by one day for each two days during which the inmate violates none of the disciplinary offense rules promulgated by the commissioner." Minn. Stat. § 244.04, subd. 1 (2008). This "good

time" is converted from confinement to supervised release. *See* Minn. Stat. § 244.05, subd. 1 (2008). The Department of Corrections (DOC) has the authority "to prescribe reasonable conditions and rules for . . . conduct, instruction, and discipline" of persons committed to the commissioner's custody. Minn. Stat. § 241.01, subd. 3a(b) (2008). The commissioner may require that an inmate convicted of a sex offense under Minn. Stat. § 609.342 (2008) be placed on ISR for "all of the inmate's conditional or supervised release term." Minn. Stat. § 244.05, subd. 6 (2008). Further, any sex offender on ISR "may be ordered to participate in an appropriate sex offender program as a condition of release." *Id*.

Any reduction in the term of imprisonment for good time accrues and must be served on supervised release. Minn. Stat. § 244.05, subd. 1 (2008). But earning good time does not free an offender from the conditions of supervised release. Here, appellant received his good time credit and was released on ISR. As the district court concluded, appellant's continued ISR at the Minnesota Sex Offender Program (MSOP) in St. Peter does not violate his rights. We conclude that appellant has not established that he has a liberty interest in having his accrued good time not be served on ISR, or in not undergoing MSOP treatment.

Further, as the district court noted, appellant is at MSOP under dual commitment to the DOC and to the Department of Human Services (DHS) as a sexually dangerous person (SDP). Thus, his civil commitment to DHS would keep him in MSOP, even if the commissioner had not ordered MSOP as a condition of appellant's supervised release. In

addition, the supreme court has determined that Minnesota's SDP law does not violate due process. *See In re Linehan*, 594 N.W.2d 867, 873 (Minn. 1999) (Linehan IV).

Appellant also seems to argue that the revocation of his ISR violated his due-process rights. But the only revocation of his ISR was in 2006, and is not the subject of this appeal. Appellant's current ISR assignment has not been revoked.

III.

Appellant argues that because he refused to sign his conditions of release, he is not bound by them. But appellant is properly in respondent's custody until his sentence expires in 2014, and respondent controls the conditions of release. *See* Minn. Stat. § 241.01, subd. 3a(b) (2008) (vesting the DOC with authority to prescribe reasonable conditions of release for persons committed to the commissioner's custody); *see also State v. Schwartz*, 628 N.W.2d 134, 138-39 (Minn. 2001) (stating that the DOC has authority over supervised release). The governing statutes do not require offender consent to release conditions; the commissioner retains broad authority even for uncooperative offenders.

Affirmed.