STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2214

Hollis J. Larson, petitioner,
Appellant,

vs.

Lucinda Jesson, Commissioner of Human Services,
Respondent.

Filed July 5, 2011
Affirmed
Schellhas, Judge

Carlton County District Court
File No. 09-CV-10-1638

Hollis J. Larson, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Barbara Berg Windels, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Harten, Judge.*

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

SCHELLHAS, Judge

Appellant challenges the district court's denial of his petition for a writ of habeas corpus. Appellant argues the following: the Minnesota Commitment and Treatment Act

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

violates his substantive and procedural due-process rights, the Ex Post Facto clause, the Double Jeopardy clause, and equal protection; he is being denied adequate treatment; his conditions of confinement are punitive; his numerous challenges to his underlying commitment are not barred by collateral estoppel; he is entitled to an evidentiary hearing; he is entitled to counsel during his habeas proceeding; the habeas proceeding should have been stayed pending the outcome of a federal district court case; and the district court should have taken judicial notice of another federal district court case. We affirm.

FACTS

Appellant Hollis Larson was initially committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) on May 22, 2008, and he was indeterminately committed on July 28, 2008. *In re Civil Commitment of Larson*, Nos. A08-1188, A08-1486, 2009 WL 1049171, at *2 (Minn. App. April 21, 2009), *review denied* (Minn. June 30, 2009). Larson appealed, and this court affirmed. *Id.* at *9.

On July 12, 2010, Larson petitioned for a writ of habeas corpus, seeking discharge from his civil commitment on the following grounds: (1) the Minnesota Commitment and Treatment Act is unconstitutional because it does not require a finding of "lack of control," violating substantive and procedural due process; (2) the conditions at MSOP are punitive, rendering his civil commitment unconstitutional in violation of the Ex Post Facto Clause, the Double Jeopardy Clause, and the prohibition against cruel and unusual punishment; (3) the conditions at MSOP for SDPs are worse than the conditions for other involuntary committees, violating his right to equal protection; (4) "MSOP's treatment program is either a sham or ineffective" because no person has ever been discharged;

(5) the committing court lacked jurisdiction over him; (6) the evidence was insufficient to commit him as an SDP; (7) he was denied a full and fair hearing of all the issues presented on appeal; (8) he was denied effective assistance of counsel; and (9) the district court improperly considered his polygraph results, improperly admitted evidence of an alleged sexual assault, improperly "transform[ed] [the] 'commitment' hearing into a 'stipulation' hearing," improperly considered a MSOP treatment report because it was "premature," and failed to hold the commitment hearing within the statutory timeframe.

The district court denied Larson's petition after concluding that he was committed under a valid civil process, that he failed to raise a sufficient facial challenge to the constitutionality of the Minnesota Commitment and Treatment Act, that he failed to show that the conditions of confinement were punitive as applied to him, that he failed to show that he has not received adequate treatment, and that his arguments regarding the commitment trial and appeal were not proper issues for a writ of habeas corpus.

This appeal follows.

D E C I S I O N

"Committed persons may challenge the legality of their commitment through habeas corpus. But the only issues the district court will consider are constitutional and jurisdictional challenges." *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999) (*Joelson III*) (citations omitted), *review denied* (Minn. July 28, 1999). A petitioner must set forth sufficient facts in his petition to establish a prima facie case for habeas relief. *State ex rel. Fife v. Tahash*, 261 Minn. 270, 271, 111 N.W.2d 619, 620 (1961). A petitioner may not use habeas proceedings to obtain review of an issue previously raised,

to substitute for an appeal, or to collaterally attack a judgment. *State ex rel. Thomas v. Rigg*, 255 Minn. 227, 234, 96 N.W.2d 252, 257 (1959); *Joelson III*, 594 N.W.2d at 908.

New Allegations on Appeal

Respondent Minnesota Commissioner of Human Services argues that Larson presents new allegations in his brief that were not raised in the district court. These allegations presented on appeal are the following: Larson is "without access to mental health treatment"; MSOP treatment staff members are inexperienced, unprofessional, and provide "next to no 'treatment'"; he does not have an individual treatment plan; MSOP lacks "sufficient staff trained, experienced, and certified in treatment of sex offenders"; MSOP lacks "a comprehensive treatment program"; MSOP lacks oversight; MSOP has no release criteria; the rapport between patients and staff is poor; reasonable opportunities for work, education, religious practices, and recreation are not provided to patients; grievance policies are inadequate; "behavior management plans" and "segregation" are used too often and inappropriately; MSOP patients are not allowed to keep and use personal possessions; "restrictions increase exponentially almost daily"; MSOP patients do not have access to a confidential telephone and telephone fees are excessive; and staff frequently open legal mail outside the patients' presence.

The record on appeal consists of the "papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. Generally, this court will not consider arguments based on evidence outside the record, and matters that are not part of the record will be stricken. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). Because Larson did not raise the above allegations in the district

court and the arguments are based on evidence outside the record, we will not consider the arguments, and they are stricken.

Constitutionality of the Minnesota Commitment and Treatment Act

"Evaluating a statute's constitutionality is a question of law," which we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "Minnesota statutes are presumed to be constitutional, and [a court's] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging a statute must demonstrate beyond a reasonable doubt that the statute is unconstitutional. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Larson's arguments concerning the constitutionality of the Minnesota Commitment and Treatment Act can be grouped into five main categories: substantive due process; procedural due process; ex post facto; double jeopardy; and equal protection.

Substantive Due Process

Citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), Larson argues that the Minnesota Commitment and Treatment Act violates his substantive due-process rights because the statutory criteria for commitment as a SDP do not include a "lack of control" requirement. For commitment as an SDP, "it is not necessary to prove that the person has an inability to control the person's sexual impulses." Minn. Stat. § 253B.02, subd. 18c(b) (2010). The Minnesota Supreme Court rejected the argument that this statutory language violates *Hendricks* and held that the statute allows civil commitment of a SDP "whose present disorder or dysfunction does not allow [the person] to

adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 872–76 (Minn. 1999) (*Linehan IV*); *see also Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870 (2002) (holding that "proof of serious difficulty in controlling behavior" is sufficient for commitment); *In re Martinelli*, 649 N.W.2d 886, 890 (Minn. App. 2002) (holding that *Linehan IV* satisfies the *Crane* standard), *review denied* (Minn. Oct. 29, 2002). The supreme court concluded that civil commitment under the Act does not violate substantive due process because the Act requires a finding that a person lacks adequate control over his or her sexually dangerous actions. *Linehan IV*, 594 N.W.2d at 876. This court is bound by established supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). Larson's argument lacks merit.

Procedural Due Process

Larson seems to argue that the Minnesota Commitment and Treatment Act violates his procedural due-process rights because commitment under the Act requires only clear-and-convincing evidence, not proof beyond a reasonable doubt. In *Addington v. Texas*, 441 U.S. 418, 432–33, 99 S. Ct. 1804, 1812–13 (1979), the Supreme Court held that the constitutionally minimum burden of proof for civil-commitment proceedings is clear-and-convincing evidence. Larson's argument lacks merit.

Ex Post Facto and Double Jeopardy Clauses

Larson argues that the Minnesota Commitment and Treatment Act violates the Ex Post Facto and Double Jeopardy Clauses because it is punitive. In *Linehan IV*, the Minnesota Supreme Court reaffirmed its prior ruling that the Act does not contravene the Ex Post Facto or Double Jeopardy Clauses. 594 N.W.2d at 871–72. The Minnesota

Supreme Court concluded that the Minnesota law focuses on treatment (not punishment) because a committed person can be released when sufficiently rehabilitated and in control of his or her sexual impulses. *Id.* at 871. Further, two primary objectives of criminal punishment, deterrence and retribution, are not implicated. *Id.* at 871–72. The statute can be invoked only when a person is suffering from a mental abnormality or personality disorder that prevents him or her from exercising control over his or her behavior. *Id.* at 872. This court is bound by established supreme court precedent. *Ward*, 580 N.W.2d at 74. Larson's argument lacks merit.

Equal Protection

If a person is found mentally ill, developmentally disabled, or chemically dependent, the court first considers "reasonable alternative dispositions," including dismissal of the petition for commitment, before committing the person to the least restrictive treatment program. Minn. Stat. § 253B.09, subd. 1(a) (2010). But if a person is found to be a SDP, "the court shall commit the patient to a secure treatment facility unless the patient establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1(d) (2010).

Larson argues that the Minnesota Commitment and Treatment Act violates equal protection because it treats SDPs differently from persons found to be mentally ill, developmentally disabled, or chemically dependent. The supreme court rejected an argument similar to Larson's when it decided *In re Linehan*, 557 N.W.2d 171, 186 (Minn. 1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596

(1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). The supreme court concluded that the Act's distinction between persons with and without mental disorders did not violate equal protection because the classification "helps isolate sexually dangerous persons most likely to harm others in the future" and is therefore reasonably connected "to the state's interests in public protection and treatment." *Id.* at 186–87. Larson's equal-protection claim fails for the same reason. *See Hince v. O'Keefe*, 613 N.W.2d 784, 788 (Minn. App. 2000) (concluding that differences between commitment as mentally ill, developmentally disabled, or chemically dependent and commitment as SPP or SDP "are justified by the increased danger posed by those committed as SPP or SDP"), *rev'd on other grounds*, 632 N.W.2d 577 (Minn. 2001). The Act's different treatment of SDPs is reasonably connected to the state's interests and satisfies equal-protection requirements. Larson's argument lacks merit.

Adequate Treatment

Larson argues that the district court erred by concluding that MSOP provides adequate treatment. "[A] person may not assert his right to treatment until he is actually deprived of that treatment." *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). Larson has not produced any evidence indicating that MSOP has denied him treatment. Larson merely asserted in his petition that "MSOP's treatment program is either a sham or ineffective" because no one has ever been released from the program.

"A person receiving services under [the Minnesota Commitment and Treatment Act] has the right to receive proper care and treatment, best adapted . . . to rendering

further supervision unnecessary." Minn. Stat. § 253B.03, subd. 7 (2010). Even if a cure is uncertain, civil commitment that "is programmed to provide treatment and periodic review" is not unconstitutional. *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994). In *In re Joelson*, 385 N.W.2d 810, 810 (Minn. 1986) (*Joelson II*), Joelson was diagnosed as suffering from pedophilia with an antisocial personality and was committed as a psychopathic personality. Joelson received treatment in a program that was not designed to treat pedophilia directly but nonetheless addressed his lack of social skills. *Joelson II*, 385 N.W.2d at 811. The supreme court, in rejecting Joelson's claim that the treatment was inadequate, concluded:

> While it is apparent that the [program] will not "cure" Joelson so that he can fully function in society, it is treatment which satisfies his statutory right to treatment and any constitutional right he may have to adequate treatment. The [program] affords Joelson the opportunity to improve his mental condition.

Id. (footnote omitted). Larson's claim that MSOP has failed to provide adequate treatment because no one has ever been released lacks merit.

Punitive Conditions

Larson argues that the Minnesota Commitment and Treatment Act is unconstitutional because his conditions of confinement are punitive as applied to him. Larson stated in his petition that SDPs are confined in a razor-wire enclosure; the living units have bars on the windows; the windows are only five inches wide; "SDPs are subject to 'stand up' verification counts, hourly window checks and 'wellness' checks"; SDPs are shackled hand and foot while being transported outside the enclosure; SDPs

have three cubic feet of property storage space; SDPs are limited in their access to outside vendors and in their quantities of purchases from the vendors; SDPs are locked into their cells at 9:45 p.m.; SDPs share a cell with other SDPs or sexually psychopathic personalities (SPP) exposing them to sexual assault or personal injury; SDPs are not considered vulnerable adults under Minnesota law; SDPs are arbitrarily placed in protective isolation; SDPs are not allowed personal computers; and SDPs are limited in their choice of electronic entertainment devices.

A secure facility may impose restrictions and conditions upon patients as "long as those conditions and restrictions do not amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 536–37, 99 S. Ct. 1861, 1873 (1979). "Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility." *Id.* at 537, 99 S. Ct. at 1873. If a restriction or condition is reasonably related to a legitimate governmental objective, it does not, without more, constitute "punishment." *Id.* at 539, 99 S. Ct. at 1874. The Minnesota Supreme Court has stated that the restrictions and conditions of civil commitment are placed on "individuals who cannot control their behavior in order to protect the public and to treat individuals for the malady causing their inability to control their behavior." *Linehan IV*, 594 N.W.2d at 882. Because the conditions at MSOP are reasonably related to a legitimate governmental objective, the conditions of confinement at MSOP facilities are not unconstitutional.

Scope of Habeas Corpus

Larson argues that the district court erred by concluding that he was estopped from relitigating issues regarding the underlying commitment proceedings. But the scope of

habeas is limited; it may not be used to address issues previously raised, as a substitute for appeal, or to collaterally attack a commitment. *Thomas*, 255 Minn. at 234, 96 N.W.2d at 257; *Joelson III*, 594 N.W.2d at 908.

Larson raised the following issues in his habeas petition: (1) the committing court lacked personal and subject matter jurisdiction over him; (2) the evidence was insufficient to commit him as an SDP; (3) he was denied effective assistance of counsel; (4) the district court improperly considered his polygraph results, improperly admitted evidence of an alleged sexual assault, improperly "transform[ed] [the] 'commitment' hearing into a 'stipulation' hearing," and improperly considered MSOP treatment report because it was "premature"; and (5) he "was denied substantive and procedural due process and equal protection by the district court's failure to hold the commitment hearing within the time mandated by section 253B.08, subd. 1."

All of these issues were previously raised in Larson's direct appeal from his commitment and therefore outside the scope of habeas corpus, except whether the district court improperly "transform[ed] [the] 'commitment' hearing into a 'stipulation' hearing." *See Larson*, 2009 WL 1049171. And habeas proceedings may not substitute for the appeal of this issue because Larson could have raised it in his direct appeal of his commitment. *See Kelsey v. State*, 283 N.W.2d 892, 893–94 (Minn. 1979) (holding that habeas petition was properly dismissed where claims could be and were raised in a direct appeal or postconviction petition). Moreover, Larson's claim that the district court improperly "transform[ed] [the] 'commitment' hearing into a 'stipulation' hearing" lacks merit. Two court-appointed examiners testified at the commitment hearing; one was

selected by the county and one was selected by Larson. *Larson*, 2009 WL 1049171, at *1. Nothing in the record before us indicates that the district court did not give Larson a full and fair opportunity to be heard or that his commitment was stipulated.

Additionally, Larson's motion to expand the record involves evidence relating solely to the commitment trial. Larson had an opportunity to raise evidentiary issues in his appeal. The district court did not err by implicitly denying Larson's motion to expand the record when it denied his petition.

Evidentiary Hearing

Larson argues that the district court erred by declining to hold an evidentiary hearing on his habeas petition. "A petitioner is entitled to an evidentiary hearing 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. May 18, 1988). Because Larson's petition raised only legal issues, the district court did not err by denying Larson's request for an evidentiary hearing.

Appointment of Counsel for Habeas Corpus Proceeding

Larson argues that the district court erred by not appointing counsel to represent him during the habeas corpus proceeding because the Minnesota Commitment and Treatment Act provides a statutory right to representation. "A patient has the right to be represented by counsel at any proceeding under [the Act]." Minn. Stat. § 253B.07, subd. 2c (2010). "The attorney shall be appointed at the time a petition for commitment is filed." *Id.* The Act limits the right to representation to "any proceeding under this chapter," which covers civil commitment cases only. *Id.* And no statutory right to

counsel in a habeas corpus proceeding exists. *See* Minn. Stat. §§ 589.01–.35 (2010) (governing habeas corpus proceedings), 611.14 (2010) (listing the persons entitled to representation by public defender). Furthermore, because habeas corpus is a civil matter, a litigant does not have a constitutional right to appointed counsel in habeas proceedings. *See Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (stating that pro se litigant has no constitutional right to counsel in civil case); *Breeding v. Swenson*, 240 Minn. 93, 96, 60 N.W.2d 4, 7 (1953) (holding that habeas corpus "is a civil remedy, separate and apart from the criminal action"). And no right to appointed counsel for habeas appeals exists. *Fratzke v. Pung*, 378 N.W.2d 112, 114 (Minn. App. 1985), *review denied* (Minn. Jan. 31, 1986).

In exercising its discretion about whether to appoint counsel for an indigent habeas petitioner, a district court considers the complexity of the facts and legal issues and the litigant's ability to present his claims without counsel. *McCall v. Benson*, 114 F.3d 754, 756 (8th Cir. 1997). Here, the factual and legal issues presented are not overly complex. And Larson's brief sufficiently raises numerous issues with citations to authority, indicating he is capable of presenting his claims without counsel. The district court did not abuse its discretion in declining to appoint counsel to represent Larson in the habeas corpus proceeding.

Stay of the Proceedings

Larson challenges the district court's refusal to stay the habeas proceeding pending an outcome in *Beaulieu v. Ludeman*, No. 07-CV-1535, 2008 WL 2498241, at *2 (D. Minn. June 18, 2008). *Beaulieu* is a section 1983 action in which committed patients

at the Moose Lake Facility allege, among other things, that the conditions of commitment constitute punishment. *Id.* at *4. Larson appears to argue that a favorable ruling in *Beaulieu* would support a favorable outcome on his habeas corpus petition.

The impact of the outcome of *Beaulieu* on this habeas petition is minimal. Although opinions of the federal courts "are persuasive and should be afforded due deference," this court is bound only by decisions of the Minnesota Supreme Court and the United States Supreme Court, even when interpreting federal statutes. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003). The district court therefore did not abuse its discretion by declining to stay the proceedings.

Judicial Notice

Larson argues that the United States District Court for the District of Minnesota "has unequivocally held that conditions of confinement at MSOP are punitive." Larson provides the case number 04-CV-1489, but does not provide a copy of the order he refers to. Two orders from the Minnesota federal district court with the referenced case number exist, neither of which "unequivocally h[o]ld[s] that conditions of confinement at MSOP are punitive." *See Holly v. Anderson*, No. 04-CV-1489, 2008 WL 1773093 (D. Minn. Apr. 15, 2008) (dismissing the majority of MSOP patient's section 1983 claims against MSOP employees for failure to state a claim upon which relief may be granted except to the extent patient alleged a violation of his due process rights against two defendants); *Holly v. Konieska*, No. 04-CV-1489, 2008 WL 3893621 (D. Minn. Aug. 18, 2008) (denying MSOP patient's motion seeking to enjoin the Carleton County Attorney's

Office and the Carleton County District Court from criminally prosecuting him). This federal section 1983 action is not relevant to Larson's habeas appeal. Larson's argument lacks merit.

Affirmed.