STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1263

Milton Brasson,
Relator,

vs.

Minnesota Department of Corrections,
Respondent.

Filed February 19, 2013
Reversed and remanded; motion denied
Toussaint, Judge[*]

Department of Corrections
File No. OID #228826

David W. Merchant, Chief Appellate Public Defender, F. Richard Gallo, Assistant Public Defender, St. Paul, Minnesota (for relator)

Lori Swanson, Attorney General, Eric John Beecher, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

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

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

TOUSSAINT, Judge

In this expedited certiorari appeal, relator Milton Brasson argues that the respondent Commissioner of Corrections erred in revoking his supervised release for a period of 150 days, when his revocation was subject to a 90-day cap under Minn. Stat. § 244.30 (2010). The commissioner concedes that the hearing officer and the executive officer erred in concluding that section 244.30 does not apply to relator. But the commissioner insists that the matter must be remanded to allow consideration of whether the 150-day revocation period nevertheless is supported by "substantial and compelling" reasons to believe that the longer period is "necessary to protect the public," under Minn. Stat. § 244.30(c). We agree, and reverse and remand for further proceedings consistent with this opinion.

In briefing to this court, relator had also argued that he is entitled to immediate release. But at oral argument, relator's counsel conceded that immediate release is an inappropriate remedy and withdrew that request. We therefore deny, as unnecessary, a motion that the commissioner brought to supplement the record or to remand in order to consider disciplinary violations that relator may have committed after the revocation at issue in this appeal.

D E C I S I O N

If an offender violates the conditions of his supervised release, the commissioner may "continue the [offender's] supervised release term," or "revoke the [offender's] supervised release and reimprison the inmate for the appropriate period of time." Minn.

Stat. § 244.05, subd. 3 (2010). Minn. Stat. § 244.30(a) imposes a cap of 90 days for a first-time revocation, as follows:

> If the commissioner revokes the supervised release of a person whose release on the current offense *has not previously been revoked*, the commissioner may order the person to be incarcerated for no more than 90 days or until the expiration of the person's sentence, whichever is less.

(Emphasis added.) But there are exceptions to the 90-day cap for persons convicted of criminal sexual conduct offenses, *see* Minn. Stat. § 244.30(b), and "if the commissioner determines that substantial and compelling reasons exist to believe that the longer incarceration period is necessary to protect the public." Minn. Stat. § 244.30(c).

Relator began his period of supervised release[1] on November 14, 2011, with conditions that prohibited him from using or possessing intoxicants or narcotics, and from purchasing or operating a motor vehicle without the written approval of his agent. On March 1, 2012, relator self-reported that he had consumed alcohol. As a result, the commissioner restructured his release conditions. On March 30, he admitted to purchasing a vehicle without his agent's approval. Less than a week later, he tested positive for cocaine and methamphetamine. Based on his agent's report, he was taken into custody on April 9, 2012.

A revocation hearing was held on April 23, 2012. Relator admitted to both violations, and the parties presented their positions regarding disposition. The hearing

[1] Relator was convicted in March 2009 of second-degree assault involving infliction of substantial bodily harm, in violation of Minn. Stat. § 609.222, subd. 2 (2008), for choking his then-girlfriend, binding her feet and neck, and torturing her by burning her repeatedly with a spoon he had heated on the kitchen stove. Under the terms of the plea agreement, he received an upward durational departure of 56 months in prison.

officer revoked relator's release for 150 days, even though relator's counsel noted that this was his first revocation and that by statute his revocation should be capped at 90 days, under section 244.30(a). The hearing officer concluded that the commissioner had previously restructured relator's supervised release when he used alcohol and that one of his current violations again involved the use of intoxicants. The officer characterized relator's offense as "very serious" and noted that relator is a level II predatory offender with a lengthy criminal history and long record of committing disciplinary infractions while incarcerated.

On appeal to the executive officer, relator again argued that there is a 90-day cap for first-time revocations. Relator also argued that the "substantial and compelling" reasons exception to the 90-day cap do not apply because the hearing officer's findings are not explicit enough and the facts do not fit the exception set out in section 244.30(c). The executive officer affirmed the decision of the hearing officer, without addressing whether there were sufficient facts to justify an exception to the 90-day cap. Relator challenges the decision by this writ of certiorari.

Judicial review on a writ of certiorari from an administrative agency's final order is limited to whether the order "was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992) (quotations omitted). "The function of the court on certiorari . . . is to decide questions of law raised by the record, but not disputed questions of fact on conflicting evidence." *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 248-49, 32 N.W.2d 574, 580 (1948).

The parties agree that the commissioner erred in determining that section 244.30 does not apply to relator, because his supervised release has not previously been revoked. Rather, after relator violated the conditions of his release by admitting to consuming alcohol, his supervised release was continued or "restructured" on March 1, 2012. Thus, at the revocation hearing on April 23, 2012, relator's release had been restructured once before, but it had "not previously been revoked." *See* Minn. Stat. § 244.30(a). Based on the plain language of the statute, we agree that the commissioner erred in concluding that the 90-day cap does not apply to relator for this first-time revocation.[2]

In his briefs to this court, relator argued that he is entitled to immediate release because he has served more than 90 days on his current revocation. At oral argument, however, relator's counsel withdrew that argument and conceded that immediate release is not appropriate. Although counsel urged this court to correct or calculate relator's projected release date, he raises the issue for the first time on appeal. The relief requested by counsel at oral argument is more appropriately sought in the first instance from the commissioner.

On this record and given the arguments made here, we conclude that a remand is necessary to allow the commissioner to correct the error in misapplying section 244.30 and to consider whether "substantial and compelling reasons exist to believe that [an incarceration period for more than 90 days] is necessary to protect the public" under the

[2] In recognition of the commissioner's erroneous reading of section 244.30, in November 2012, the department of corrections issued Policy 106.140I, which clarifies that a "revocation includes an offender who has previously violated a condition[s] of release and was revoked and returned to prison" for purposes of applying section 244.30.

exception set out in section 244.30(c). The issue of whether substantial and compelling reasons exist was raised in this case, but neither the hearing officer nor the executive officer considered the issue because both erroneously concluded that section 244.30 does not apply to relator. *See Spurck*, 226 Minn. at 251, 32 N.W.2d at 581 (concluding that when writ of certiorari results in reversal of agency's decision, "the case should be remanded for further proceedings" consistent with rule of law decided by appellate court and that such remand "does not dismiss or terminate the administrative proceedings").[3]

We therefore reverse the decision of the commissioner and remand for further proceedings. We also deny, as unnecessary, the commissioner's motion to remand or to supplement the record.

Reversed and remanded; motion denied.

[3] We note that relator has filed a "pro se supplemental brief" in this court. Such briefs are authorized by the rules of criminal procedure, but this is a certiorari appeal governed by the civil rules. *See* Minn. R. Crim. P. 28.02, subd. 5(17). Even if we were to consider the brief, relator merely offers facts in an attempt to explain the two violations that led to revocation of his release. He offers no legal argument or citations to legal authority. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (stating that claims raised in pro se supplemental brief that are unsupported by legal argument or citations to legal authority are deemed waived). His claims are insufficient to overturn the commissioner's determination that he violated the terms of his release. *See Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 673 (Minn. 1990) (stating that writ of certiorari "cannot be used to . . . determine the weight of evidence, nor to review decisions based upon conflicting evidence") (quotation omitted)).