

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1563**

Brian Lee Wilbur, petitioner,
Appellant,

vs.

Tom Roy, Commissioner of Corrections, et al.,
Respondents.

**Filed April 8, 2013
Affirmed
Schellhas, Judge**

Carlton County District Court
File No. 09-CV-12-853

Brian Lee Wilbur, Moose Lake, Minnesota (pro se appellant)

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

Krista Jean Guinn Fink, Minnesota Department of Corrections, St. Paul, Minnesota (for respondents)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's denial of his petition for a writ of habeas corpus, arguing that respondents violated his constitutional rights by imposing 360 days' extended incarceration as a disciplinary penalty. We affirm.

FACTS

A jury found appellant Brian Wilbur guilty of second-degree criminal sexual conduct, fourth-degree criminal sexual conduct, and two counts of first-degree burglary in September 1997. The district court sentenced Wilbur to 360 months' imprisonment. Wilbur sought postconviction relief, and the district court granted Wilbur relief, resentencing him to 300 months' imprisonment in June 2001.

A Minnesota Department of Corrections (DOC) program-review team directed Wilbur to comply with a sex-offender assessment and complete the assessment recommendations. The assessment identified a "need for a treatment intervention," and, in October 2009, Wilbur entered the preliminary stage of treatment in the Minnesota Sex Offender Program (MSOP). As part of his treatment participation, Wilbur acknowledged in writing that he was "subject to all expectations and rules of the Program, including the penalties of program failure and/or self-termination," and that the penalty for a first offense of "[f]ail[ing] to comply with the treatment directive may result in additional incarceration" of "360 days Extended Incarceration" (EI). On July 12, 2010, Wilbur signed a "PARTICIPANT INITIATED TERMINATION," acknowledging that he "initiated this procedure and indeed want[ed] to sign out of treatment." On July 13,

Wilbur, in writing, waived his right “TO ALL PROCEDURAL RIGHTS INCLUDING APPEAL” and pleaded guilty, admitting that he violated Offender Discipline Regulation “510 MANDATED TREATMENT FAILURE/REFUSAL,” and respondent Commissioner of Minnesota Department of Corrections imposed 360 days’ EI as a penalty. Wilbur appealed the EI penalty, and the commissioner denied his appeal.

In April 2012, Wilbur petitioned the district court for a writ of habeas corpus, arguing that the commissioner violated Minn. Stat. § 244.04, subd. 2 (2012)¹, when he imposed EI “beyond the maximum term allowed” and rejected Wilbur’s “[a]pplication for restoration of [his] good time,” and that Minn. Stat. § 244.03 (2012) is an ex post facto law because it imposes sanctions on inmates who refuse to participate in rehabilitative programs. The district court denied Wilbur’s petition.

This appeal from the denial of a writ of habeas corpus follows.

D E C I S I O N

A writ of habeas corpus is a statutory civil remedy available “to obtain relief from [unlawful] imprisonment or restraint.” Minn. Stat. § 589.01 (2012). A writ of habeas corpus is not available to “persons committed or detained by virtue of the final judgment of a competent tribunal of civil or criminal jurisdiction.” *Id.* The petitioner shoulders the burden to demonstrate the illegality of the detention. *Case v. Pung*, 413 N.W.2d 261, 262 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). This court gives “great weight

¹ We cite the most recent version of Minn. Stat. § 244.04, subd. 2, because it has not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm’rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, “appellate courts apply the law as it exists at the time they rule on a case”). For the same reason, we also cite the current versions of other statutes cited in this opinion.

to the district court's findings in considering a petition for a writ of habeas corpus and will uphold the findings if they are reasonably supported by the evidence." *Roth v. Comm'r of Corr.*, 759 N.W.2d 224, 227 (Minn. App. 2008) (quotation omitted).

Imposition of EI and Loss of Good Time

Wilbur argues that the commissioner violated Minn. Stat. § 244.04, subd. 2, when he imposed EI "beyond the maximum term allowed" and rejected Wilbur's "[a]pplication to restore his lost good time." Section 244.04, subdivision 2, provides that "the commissioner shall promulgate rules specifying disciplinary offenses which may result in the loss of good time and the amount of good time which may be lost as a result of each disciplinary offense, including provision for restoration of good time." Wilbur claims that the commissioner violated his right to due process because he did not adhere to section 244.04, subdivision 2, and that Wilbur is entitled to have his penalty of 360 days' EI rescinded based on the following language in section 244.04, subdivision 2: "In no case shall an individual disciplinary offense result in the loss of more than 90 days of good time." Wilbur's argument lacks merit.

First, we note that, although Wilbur alleges a violation of due process, he does so only vaguely without developing his constitutional argument. This is significant because Wilbur's claim is not cognizable on a petition for a writ of habeas corpus if it alleges a statutory, rather than constitutional, violation. See *Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 547–48 (Minn. App. 2011) (stating that "a habeas petition must allege either a lack of jurisdiction or a violation of a constitutional right"), *aff'd on other grounds*, 825 N.W.2d 716 (Minn. 2013). But even if Wilbur's claim were cognizable on a

petition for a writ of habeas corpus, it lacks merit. The provisions of section 244.04 do not apply to Wilbur because they “do not apply to an inmate serving a mandatory life sentence or to persons whose crimes were committed on or after August 1, 1993.” *Id.*, subd. 3 (emphasis added). The district court initially sentenced Wilbur on October 24, 1997, and reduced his sentence on June 19, 2001.

Ex Post Facto Law

Wilbur argues that Minn. Stat. § 244.03 is an ex post facto law because it imposes sanctions on inmates who refuse to participate in rehabilitative programs. He argues that, when he was sentenced in 1997, Minn. Stat. § 244.03 (1996) was “an ambiguous statute relating to [its] language” and that the commissioner did not have statutory authority to impose EI as a disciplinary penalty until 1999, when the legislature amended section 244.03, removing the ambiguous language. Wilbur’s argument is unpersuasive.

The United States and Minnesota Constitutions prohibit the passing of ex post facto laws. U.S. Const., art. I, §§ 9–10; Minn. Const. art. I, § 11. The purpose of the prohibition is to “assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed” and “restrict[] governmental power by restraining arbitrary and potentially vindictive legislation.” *Carmell v. Texas*, 529 U.S. 513, 566, 120 S. Ct. 1620, 1650 (2000) (quotations omitted). “To fall within the ex post facto prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it.” *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 896 (1997) (quotation omitted).

Wilbur argues that when he was sentenced in 1997, section 244.03 was ambiguous because it required the commissioner to provide treatment or rehabilitative programs to inmates who *volunteered* to participate, which, Wilbur argues, contradicts any language in the statute that *required* him to participate in treatment or rehabilitative programs. Wilbur's argument is unpersuasive. When the district court sentenced Wilbur in 1997, the law unambiguously authorized the commissioner to impose sanctions for an inmate's refusal to participate in a treatment or rehabilitative program. Minn. Stat. §§ 244.03 (stating that the commissioner "shall provide appropriate mental health programs and vocational and educational programs . . . for inmates who . . . are required to participate in the programs under the disciplinary offense rules adopted by the commissioner under section 244.05, subdivision 1b"), .05, subd. 1b(a) (1996) (stating that generally "every inmate sentenced to prison for a felony offense committed on or after August 1, 1993, shall serve a supervised release term upon completion of the inmate's term of imprisonment and *any disciplinary confinement period imposed by the commissioner due to the inmate's violation of any disciplinary offense rule* adopted by the commissioner under paragraph b" (emphasis added)). Included among the commissioner's authorized disciplinary-offense rules were rules that sanctioned "violation of institution rules, refusal to work, *refusal to participate in treatment* or other rehabilitative programs, and other matters to be determined by the commissioner." Minn. Stat. § 244.05, subd. 1b(b) (1996) (emphasis added). No language in sections 244.03 or 244.05 limits the commissioner's authority to impose sanctions upon inmates who refuse to participate in mandatory rehabilitative programs. Rather, in section 244.05, subdivision 1b(a)–(b), the Legislature

granted broad authority to the commissioner to create and enforce disciplinary-offense rules. See *State ex rel. Griep v. Skon*, 568 N.W.2d 453, 456 (Minn. App. 1997) (interpreting Minn. Stat. § 244.05, subd. 1b(b) (1996), as providing the commissioner with “broad authority to promulgate disciplinary offense rules”).

Wilbur cites *Rud v. Fabian*, 743 N.W.2d 295 (Minn. App. 2007), *review denied* (Minn. Mar. 26, 2008), as support for his argument that the commissioner violated the ex post facto prohibition when he imposed EI on him. Wilbur’s reliance on *Rud* is misplaced. In *Rud*, the district court sentenced Rud to prison in 1985, and the commissioner sanctioned him for his refusal to participate in a mandatory rehabilitative sex-offender program in 2003. 743 N.W.2d at 296–97. The district court concluded that the commissioner’s sanction violated the ex post facto prohibition, and this court agreed, concluding that at the time of Rud’s sentencing, in 1985, the commissioner did not have the authority to require participation in rehabilitative programs or impose sanctions for failure to do so. *Id.* at 297, 300–01. Unlike in *Rud*, when the district court sentenced Wilbur in 1997, the commissioner had unambiguous statutory authority to create and enforce mandatory rehabilitative programs and to impose a “disciplinary confinement period” on an inmate for his “*refusal to participate in treatment.*” Minn. Stat. § 244.05, subd. 1b(a)–(b) (emphasis added). We conclude that the commissioner properly exercised his unambiguous statutory authority when he imposed 360 days’ EI on Wilbur as a disciplinary penalty for his self-termination from sex-offender treatment without restoring his good time.

Affirmed.