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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0651**

Michael D. Perseke,
Appellant,

vs.

Jodi Harpstead, et al.,
Respondents,

Paul Schnell,
Respondent.

**Filed December 21, 2020
Affirmed
Smith, Tracy M., Judge**

Carlton County District Court
File No. 09-CV-19-2363

Michael D. Perseke, Moose Lake, Minnesota (pro se appellant)

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Minnesota (for respondents Jodi Harpstead and Nancy Johnston)

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Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and

Halbrooks, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this appeal from the denial of a petition for a writ of habeas corpus, appellant Michael D. Perseke argues that the district court erred by denying his petition because respondent Commissioner of the Minnesota Department of Corrections (DOC)¹ miscalculated his conditional-release term, violated his due-process rights, and violated the prohibition against ex post facto laws. Perseke also argues that the district court erred by not holding an evidentiary hearing. We affirm.

FACTS

In 2003, Perseke pleaded guilty to one count of burglary in the first degree and one count of criminal sexual conduct in the third degree. He was sentenced to consecutive prison terms of 98 months on the burglary conviction and 46 months on the criminal-sexual-conduct conviction, as well as to ten years of conditional release under Minn. Stat. § 609.109, subd. 7(a) (2002), based on the sex offense.²

When Perseke was sentenced, DOC calculated the expiration date of an offender's sentence according to the principle—supported by then-current Minnesota Court of Appeals caselaw—that a conditional-release term runs concurrently with a supervised-

¹ Other respondents are officials with the Minnesota Department of Human Services (DHS). Perseke is currently committed to DHS's Minnesota Sex Offender Program (MSOP). The DHS respondents did not file a brief because Perseke does not challenge the lawfulness of the MSOP confinement.

² The statutory provision for conditional-release terms based on sex offenses has been recodified a number of times since 2002; the current provision is found in Minn. Stat. § 609.3455, subd. 6 (2013).

release term. *See State v. Koperski*, 611 N.W.2d 569, 573 (Minn. App. 2000) (“[S]upervised release and conditional release periods must run concurrently.”), *abrogated by State ex rel. Pollard v. Roy*, 878 N.W.2d 341 (Minn. App. 2016), *vacated and remanded* (Minn. Dec. 27, 2016), *aff’d on similar grounds*, 2017 WL 1833209 (Minn. App. May 8, 2017), *review denied* (Minn. July 18, 2017). Applying this principle to Perseke’s sentence, DOC projected that Perseke’s conditional-release term would expire in 2016.³

In September 2012, DOC sent Perseke a memorandum informing him that it had recalculated the projected expiration date of his conditional-release term. DOC explained that it was recalculating sentences for all offenders sentenced to conditional-release terms in light of two recent decisions from this court. In *State ex rel. Peterson v. Fabian*, we held that a conditional-release term imposed on a predatory offender under Minn. Stat. § 243.166 (2008) for failure to register runs consecutively to, rather than concurrently with, the offender’s supervised-release term. 784 N.W.2d 843, 846 (Minn. App. 2010). In *State ex rel. Cote v. Roy*, in a nonprecedential order opinion, we concluded that consecutive calculation also applied to a conditional-release term for a sex offender imposed under Minn. Stat. § 609.109, subd. 7(a). No. A11-0727 (Minn. App. Nov. 15, 2011), *review denied* (Minn. Jan. 25, 2012).

Based on these cases, DOC clarified that Perseke’s conditional-release term would begin after his supervised-release term concluded in 2015 and projected that his

³ In April 2012, DOC sent Perseke a memorandum explaining that Perseke’s consecutive sentences had been entered in the wrong order and that, upon correction of that mistake, the expiration date of his conditional release term would be April 15, 2022. Perseke does not challenge this action, nor does it affect our analysis here.

conditional-release term would expire in April 2025. DOC explained that Perseke would receive credit against his conditional-release term for each day that he served on supervised release. DOC gave Perseke 1,086 days of credit against his conditional-release term and, following another correction not at issue here, recalculated the expiration date of his conditional release to be April 15, 2022.

Perseke petitioned for a writ of habeas corpus, arguing that DOC erroneously calculated his conditional-release term. The district court denied his petition without a hearing because it determined that, as a matter of law, DOC properly calculated his conditional-release term in accordance with our decisions in *Peterson* and *Cote*.

This appeal follows.

DECISION

A writ of habeas corpus is a statutory civil remedy available to obtain relief from unlawful imprisonment or restraint. Minn. Stat. § 589.01 (2018). On review of a denial of a petition for a writ of habeas corpus, the district court’s findings “are entitled to great weight and will be upheld if reasonably supported by the evidence.” *Aziz v. Fabian*, 791 N.W.2d 567, 569 (Minn. App. 2010). We review questions of law de novo. *Id.*

I. The district court did not err by concluding that DOC properly calculated Perseke’s conditional-release term to run consecutively to his supervised release.

Perseke contends that DOC miscalculated his conditional-release term. He argues that *Peterson* does not apply to him because that case involved conditional release imposed under Minn. Stat. § 243.166, subd. 5(a) (2008), while Pereske’s conditional release was imposed under Minn. Stat. § 609.109, subd. 7(a). His argument fails.

In *Peterson*, we held that “a conditional-release term for failure-to-register [predatory] offenders under Minn. Stat. § 243.166, subd. 5(a), is consecutive to a supervised-release term.” 784 N.W.2d at 846. The basis for our conclusion was our interpretation of the plain language of Minn. Stat. § 243.166, subd. 5(a), which stated that “the court shall provide that *after the person has completed the sentence imposed*, the commissioner shall place the person on conditional release for ten years.” *Id.* (emphasis added). We concluded that, because “a sentence includes both the term of imprisonment and the term of supervised release, the conditional-release term under Minn. Stat. § 243.166, subd. 5(a), does not commence until after both the term of imprisonment and the term of supervised release are completed.” *Id.* (citations omitted).

In *Cote*, we extended *Peterson*’s holding to a sex offender subject to a conditional-release term imposed under Minn. Stat. § 609.109, subd. 7(a). *Cote*, No. A11-0727. That statute, like the version of section 243.166 analyzed in *Peterson*, stated that conditional release begins “*after the person has completed the sentence imposed*.” Minn. Stat. § 609.109, subd. 7(a) (emphasis added). The relevant statutory language at issue in *Peterson* and *Cote* is nearly identical. Compare Minn. Stat. § 243.166, subd. 5(a) (“[A]fter the person has completed the sentence imposed, the commissioner shall place the person on conditional release.”), with Minn. Stat. § 609.109, subd. 7(a) (“[A]fter the person has completed the sentence imposed, the commissioner of corrections shall place the person on conditional release.”). Both statutes stated that conditional release begins after the sentence is served, and our holding in *Peterson* depended on this clear statutory language. See *Peterson*, 784 N.W.2d at 846 (“[W]e apply the clear language of section 243.166,

subdivision 5a, that ‘the court shall provide that after the person has completed the sentence imposed, the commissioner shall place the person on conditional release for ten years.’” (emphasis omitted)). We concluded in *Cote* that we could discern no reason for a different outcome from the one in *Peterson* simply because Cote’s conditional-release term was imposed under Minn. Stat. § 609.109, subd. 7(a), rather than Minn. Stat. § 243.166, subd. 5(a).

Pereske’s conditional-release term was imposed under the same statute as that at issue in *Cote*. As in *Cote*, we can discern no reason for a different outcome from *Peterson*. Moreover, post-*Cote* cases support the conclusion that consecutive calculation applies. See *State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 274 (Minn. 2016) (upholding DOC’s 2012 recalculation of a conditional-release term imposed under Minn. Stat. § 609.109, subd. 7, to run consecutively in light of *Peterson* and *Cote*); *Pollard*, 878 N.W.2d at 349-50 (abrogating *Koperski*’s holding that supervised release and conditional release periods run concurrently when addressing a conditional-release term imposed under Minn. Stat. § 609.3455, subd. 6).

Pereske also relies on an unpublished decision, *Thundercloud v. Harpstead*, No. A19-0529, 2019 WL 5541493 (Minn. App. Oct. 28, 2019), to argue that *Peterson* does not apply to him. Unpublished decisions are not precedential, Minn. Stat. § 480A.08, subd. 3(c) (2018), but, in any event, our decision in *Thundercloud* is easily distinguished. In *Thundercloud*, the offender committed his crime before August 1993 when the applicable statute provided that the conditional-release period would last for “the remainder of the statutory maximum period or for ten years, whichever is longer.” *Thundercloud*,

2019 WL 5541493, at *2 (quoting Minn. Stat. § 609.1352, subd. 5 (1992)) (emphasis and internal quotation marks omitted). Thundercloud’s conditional-release term was to begin after he “completed the sentence imposed, less any good time.” *Id.* (quoting Minn. Stat. § 609.1352, subd. 5) (internal quotation marks omitted). We concluded that the pre-August 1993 “good time” statute differed from the statute in place at the time of the later *Peterson* decision and that DOC had improperly applied *Peterson* to Thundercloud’s sentence. *Id.* at *2 n.1. But, unlike in *Thundercloud*, and as we decided in *Cote*, the statutes that govern Peterson’s and Perseke’s conditional-release terms use the same plain language and are therefore treated the same. Thus, Perseke’s conditional release begins after his sentence is served, and DOC’s consecutive calculation was correct.

II. Perseke’s constitutional claims fail.

Perseke argues that DOC’s application of the *Peterson* and *Cote* decisions to him violates the prohibition against ex post facto laws and his due-process rights.

We begin with Perseke’s ex post facto claim. Both the United States and Minnesota State Constitutions contain ex post facto clauses that prohibit states from imposing punishment for an act that was not punishable when it was committed or that imposes additional punishment than prescribed. U.S. Const. art. I, § 10; Minn. Const. art. I, § 11; *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981); *Rew v. Bergstrom*, 845 N.W.2d 764, 790 (Minn. 2014). To constitute an ex post facto law, a statute must be a criminal or penal law, it must not be “merely procedural,” it must “apply to events occurring before its enactment, and it must disadvantage the offender affected by it.”

Graham, 450 U.S. at 29 n.12, 101 S. Ct. at 964 n.12; *State v. Moon*, 463 N.W.2d 517, 521 (Minn. 1990).

Perseke does not challenge a statute imposing a new punishment. Rather, he challenges DOC's application of decisions by this court interpreting the plain language of statutory provisions imposing conditional-release terms. The plain language that we interpreted is the same language that governed Perseke's conditional-release term at the time of his court-imposed criminal sentence. Our court decisions simply clarified the meaning of the existing statutory language, including in section 609.109, and DOC applied that clarification to Perseke. No statute imposed new punishment, and Perseke's *ex post facto* argument lacks merit.

As to Perseke's due-process claim, to the extent that it is based on Perseke's objection to DOC's recalculation in light of the *Peterson* and *Cote* decisions, his argument is the same as his *ex post facto* argument and again fails because no new punishment was imposed on Perseke. To the extent that Perseke's due-process claim is based on the contention that he was entitled to notice before DOC recalculated his conditional-release term, that procedural-due-process claim is forfeited because Perseke makes it for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). In any event, the argument fails on its merits because Perseke does not identify any due-process interest that is violated by DOC recalculating his conditional-release term based on intervening caselaw without advance notice or any state law or authority requiring DOC to hold a hearing before recalculating it. *See Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005) (explaining that, to establish a procedural-due-process violation by DOC, an offender must establish a

protected liberty interest and that DOC lacked a procedure to adequately protect that interest).

III. The district court did not err by deciding Perseke's habeas petition without an evidentiary hearing.

An evidentiary hearing on a habeas petition is unnecessary if a petitioner fails to allege sufficient facts to establish a prima facie case for relief or if the petition does not show a factual dispute. *Seifert v. Erickson*, 420 N.W.2d 917, 920 (Minn. App. 1988). Because Perseke failed to allege sufficient facts to establish a prima facie case for relief and he did not identify a factual dispute, Perseke's petition could be decided as a matter of law and no evidentiary hearing was necessary. The district court did not err by deciding Perseke's habeas petition without an evidentiary hearing.

Affirmed.