STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1285

Raymond Semler,
Appellant,

vs.

Jodi Harpstead, Commissioner of Department of Human Services, et al.,
Respondents.

Filed April 5, 2021
Affirmed
Frisch, Judge

Carlton County District Court
09-CV-20-666

Raymond L. Semler, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Brandon Boese, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Florey, Presiding Judge; Reilly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this appeal from the denial of a petition for a writ of habeas corpus, appellant argues that he should be released from his civil commitment because his continued commitment during the COVID-19 pandemic amounts to cruel and unusual punishment

and violates his due-process rights. Because respondents adopted numerous reasonable measures to reduce the exposure and spread of COVID-19 within the facility, we affirm.

FACTS

Appellant Raymond Semler has been indeterminately civilly committed as a sexually dangerous person at the Minnesota Sex Offender Program (MSOP) since 2006. He currently resides at the MSOP facility in Moose Lake. On April 22, 2020, Semler petitioned for a writ of habeas corpus, seeking his immediate release due to the COVID-19 pandemic. Semler claimed that he had a much higher risk of contracting COVID-19 than the general population because he lived in a long-term care facility where social distancing was not possible. He further alleged that MSOP was not capable of protecting him from the virus. Accordingly, Semler argued that his release from the facility was the only way to avoid being subjected to cruel and unusual punishment.

Respondents are Jodi Harpstead, the Commissioner of the Department of Human Services, and Nancy Johnston, the Chief Executive Officer of MSOP. In response to Semler's petition, respondents submitted an affidavit by the Health Services Director for MSOP. The director described the policies and precautions enacted at the Moose Lake facility to limit the exposure and transmission of COVID-19. Those policies were in effect in May 2020, but the director stated that MSOP would continue to adapt its procedures based on guidance from state and federal health officials.

To prevent COVID-19 from entering the facility, MSOP suspended all in-person visits between clients and outside visitors. It also prohibited nonessential outside contractors from entering the facility. MSOP conducted daily health screens of all its

employees. Before beginning their shifts, employees were required to wait outside the facility while maintaining at least six feet of distance between each other. Employees who had particular symptoms, such as fever, cough, or shortness of breath, were not permitted to enter the facility. Employees who did not exhibit any symptoms had their temperature taken and were permitted to enter only if their temperature was below 100 degrees. The employees who exhibited symptoms could return to work only after at least ten days passed since the onset of symptoms or three days passed without a fever, whichever was longer. They also had to show improvement in their other symptoms and were required to contact human resources for guidance on returning to work. Essential outside contractors were subject to the same requirements as employees.

MSOP provided cloth masks to all clients and cloth and paper masks to all staff. The clients were strongly encouraged, but not required, to wear masks, whereas MSOP required staff to wear masks while at work. Clients were required to wear masks while performing vocational work outside of their living units.

MSOP took steps to keep the facility clean. The staff cleaned "high-touch" areas, such as door handles and frequently used tables, at least three times per day. Alcohol-based hand sanitizer was available to all clients and staff. Clients could obtain hand sanitizer at the staff desk in their living unit and could check out cleaning supplies from the supply closet to clean their rooms.

To limit the spread of COVID-19 within the facility, MSOP conducted activities based on individual living units. Meals, canteen service, and recreational services were performed on a unit-by-unit basis, and cross-unit services were suspended. Certain

recreational services, such as the gym, music room, and library, remained accessible with a ten-person limit to each room. Clients were instructed to maintain proper social distancing in those rooms, and the ten-person limit was reduced when social distancing could not occur. Other efforts to maintain social distancing throughout the facility included signage and floor markers to promote and indicate six-foot distancing. Treatment groups were limited to ten individuals per room, with chairs spaced at least six feet apart. The number of people in the room was limited when it was not possible to place ten chairs six feet apart.

MSOP established an isolation unit at the facility to house clients who may have become infected with COVID-19. A client who exhibited symptoms consistent with COVID-19 was required to remain in his room, while his roommate was removed and the entire living unit was locked down. Staff then assessed the client. If a medical practitioner determined that the client may have become infected with COVID-19, then the client was brought to the isolation unit. Staff then initiated contact tracing to determine those people with whom the client had contact. The client received a COVID-19 test in the isolation unit, which was sent to the local hospital for analysis. Even when the test was negative, the client was not released from the isolation unit until health services determined that symptoms could be attributed to another health condition, or until up to 14 days passed. In the isolation unit, clients were required to remain in their rooms except to shower.

MSOP also established a quarantine unit, separate from the isolation unit, to house clients who may have been exposed to others exhibiting symptoms of COVID-19. Clients in the quarantine unit were encouraged to remain in their rooms but could take ten-minute

breaks outside their room. They were required to stay in the quarantine unit until the person with whom they came into contact was removed from the isolation unit. As a precautionary measure, any newly admitted or readmitted client to MSOP was required to spend the first 14 days at the facility in the quarantine unit.

MSOP enacted other various procedures to prevent the entrance and spread of COVID-19 at the facility. All legal proceedings were conducted remotely using video teleconference or telephone. Nonemergency, offsite medical procedures were suspended, and clients receiving necessary, offsite medical procedures were screened for symptoms when leaving and returning to the facility. MSOP also provided all clients with weekly informational memos explaining the steps it was taking to keep those in the facility healthy and offering tips to reduce the spread of COVID-19. Finally, any clients who were elderly or had serious underlying health conditions resided in a separate unit.

The procedures that MSOP implemented were consistent with the recommendations for congregate settings provided by the United States Centers for Disease Control and Prevention (CDC). But MSOP did not adopt recommendations that were not possible or practicable, such as staying six feet apart while sleeping and ending communal dining.

The district court concluded that MSOP's actions in response to COVID-19 did not show deliberate indifference to the safety of the clients, did not shock the conscience, and were not punitive. It therefore determined that MSOP did not violate Semler's constitutional rights and denied Semler's petition for a writ of habeas corpus. Semler appeals.

DECISION

A writ of habeas corpus is a statutory civil remedy available "to obtain relief from imprisonment or restraint." Minn. Stat. § 589.01 (2020). Individuals who are civilly committed may challenge the legality of their commitment through habeas corpus. *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "A writ of habeas corpus may also be used to raise claims involving fundamental constitutional rights and significant restraints on a[n] [individual'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). The petitioner has the burden of showing that his detention is illegal. *Case v. Pung*, 413 N.W.2d 261, 262 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). When reviewing a district court's ruling on a petition for a writ of habeas corpus, we will uphold the district court's findings if they are reasonably supported by the evidence. *Rud v. Fabian*, 743 N.W.2d 295, 297 (Minn. App. 2007), *review denied* (Minn. Mar. 26, 2008). We review questions of law de novo. *Id.* at 298.

I. Semler's continued confinement does not constitute cruel and unusual punishment because MSOP was not deliberately indifferent to a substantial risk of serious harm.

In his petition, Semler alleged that his continued commitment at the MSOP facility during the COVID-19 pandemic violated his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The Eighth Amendment requires prison officials to provide humane conditions of confinement and to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*,

511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994) (quotation omitted). The Eighth Amendment does not apply to patients who are involuntarily committed because the purpose of their confinement is treatment, not punishment after a conviction. *Revels v. Vincenz*, 382 F.3d 870, 874 (8th Cir. 2004). Instead, the rights of civilly committed patients arise under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Nevertheless, the Fourteenth Amendment provides civilly committed individuals with at least as many protections as the Eighth Amendment provides convicted prisoners. *Beaulieu v. Ludeman*, 690 F.3d 1017, 1045 (8th Cir. 2012). Therefore, courts apply the standard under the Eighth Amendment to claims brought by civilly committed individuals. *Id.*

A constitutional violation based on a failure to prevent harm requires proof of: (1) conditions posing a substantial risk of serious harm, and (2) deliberate indifference to health or safety. *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977. Deliberate indifference requires more than mere negligence but less than purpose or knowledge. *Id.* at 835, 114 S. Ct. at 1978. Instead, deliberate indifference is analogous to recklessness, as "the official[s] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." *Id.* at 836-37, 114 S. Ct. at 1978-79. Nevertheless, there is no constitutional violation when the officials actually knew of a substantial risk to health or safety and they "responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844, 114 S. Ct. at 1982-83.

The district court did not err by concluding that COVID-19 poses a substantial risk of serious harm or that the spread of COVID-19 in congregate living facilities, including the one in which Semler is confined, presents a substantial risk of serious harm even though Semler has not actually been infected with COVID-19. The Constitution protects against future harm to detainees, and "a remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 2480-81 (1993). But notwithstanding the substantial risk of serious harm, to give rise to a constitutional violation, Semler must also demonstrate that MSOP showed deliberate indifference to the health and safety of its clients. MSOP officials were aware of COVID-19 and the risks it posed to the clients. We therefore must decide whether MSOP responded reasonably to the risk of COVID-19.

The district court also did not err in concluding that the evidence establishes that MSOP's response to the risk posed by COVID-19 was reasonable. MSOP took comprehensive measures to prevent COVID-19 from entering the facility by suspending in-person visits from outside visitors and nonessential outside contractors and by screening employees and essential outside contractors before they entered the facility. MSOP also undertook extensive, methodical efforts to prevent the spread of COVID-19 within the facility by providing clients with masks, requiring MSOP staff to wear masks, cleaning "high-touch" areas multiple times each day, making hand sanitizer and cleaning supplies available to clients, conducting activities by individual living unit, placing signs and markers throughout the facility to promote six-foot social distancing, and limiting treatment groups to ten individuals spaced six feet apart in each room. MSOP established

protocols and adopted procedures to prevent the spread of COVID-19 within the facility. MSOP established a separate isolation unit for clients who exhibited symptoms consistent with COVID-19, where such clients were tested for the virus and were not permitted to leave until medical staff were confident that they were not infected with COVID-19. MSOP established a separate quarantine unit for newly admitted clients and clients who interacted with potentially infected clients. And MSOP provided clients with weekly information memos containing instructions and suggestions to reduce the spread of COVID-19. Because MSOP adopted numerous measures to prevent COVID-19 from entering and spreading within the facility, it responded reasonably to the risk and was not deliberately indifferent to a substantial risk of serious harm.

Despite the adoption of these comprehensive precautions, Semler argues that MSOP has been deliberately indifferent to COVID-19 because it did not adopt procedures he suggests. He alleges that (1) MSOP has not tested anyone within the facility; (2) treatment groups are still occurring; (3) hand sanitizer is available only at the staff desk and not in the rest of the facility; (4) no plexiglass partitions were placed on phones or staff desks, high-traffic areas are rarely cleaned, and cleaning closets are rarely available to clients; and (5) clients are moved between units and placed in double-occupancy cells. Semler raised many of those same concerns in June 2020.[1]

[1] After filing this appeal, Semler submitted two affidavits to this court in which he alleged new facts regarding the conditions in the facility. Because those affidavits were not filed with the district court, they are not part of the record on appeal under Minn. R. Civ. App. P. 110.01, and we do not consider them.

The fact that MSOP did not adopt additional precautionary measures that Semler deems appropriate does not mean that MSOP was deliberately indifferent to the substantial risk of harm presented by COVID-19. MSOP implemented the precautions that the CDC recommended for congregate settings, except for the restrictions that were not possible or practicable. In sum, the undisputed record shows that MSOP undertook reasonable efforts for preventing the entry of COVID-19 into the facility and the spread of COVID-19 within the facility.[2]

II. Semler's continued confinement does not violate his due-process rights.

Semler also contends that his continued civil commitment during the pandemic violates his due-process rights.[3] He argues that his confinement (1) amounts to punishment in violation of the Due Process Clause of the Fourteenth Amendment and (2) violates his right to substantive due process. We address each argument in turn.

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[2] Semler appears to argue that a more rigorous standard than deliberate indifference should apply to his claim. He cites *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015), for the proposition that he need only show that the officials' actions were objectively unreasonable. We are not persuaded. *Kingsley* involved a pretrial detainee's claim that an official used excessive force. 576 U.S. at 396-97, 135 S. Ct. at 2472-73. This case, on the other hand, involves a claim for failure to prevent harm. Nothing in *Kingsley* suggests that the objective-reasonableness test should apply to this type of claim or that courts should depart from the deliberate-indifference test. Although the Ninth Circuit has extended *Kingsley* and held that the objective-reasonableness test also applies to failure-to-protect claims involving pretrial detainees, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070-71 (9th Cir. 2016), the Eighth Circuit has declined to do so, *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018). But even if objective reasonableness were the proper test, Semler is still not entitled to relief. MSOP implemented comprehensive precautions in response to COVID-19, and its actions were objectively reasonable.

[3] Semler did not raise this argument in his petition. We nevertheless decide the issue because respondents raised it in their return to Semler's petition, and the district court addressed it in its order.

A. Semler's confinement does not amount to unconstitutional punishment.

"[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872 (1979). Accordingly, when evaluating the constitutionality of the conditions of a pretrial detention, courts must determine whether the conditions "amount to punishment of the detainee." *Id.* Because civilly committed individuals also may not be punished, that same standard applies to them. *Karsjens v. Lourey*, No. 18-3343, 2021 WL 709565, at *4 (8th Cir. Feb. 24, 2021). The proper test for determining whether a particular condition amounts to punishment is whether the condition "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538, 99 S. Ct. at 1873. "Absent a showing of an expressed intent to punish," a restriction does not amount to punishment when it is "reasonably related to a legitimate governmental objective." *Id.* at 538-39, 99 S. Ct. at 1873-74. Conversely, a restriction amounts to punishment and therefore violates due process when it is "arbitrary or purposeless" and is not reasonably related to a legitimate goal. *Id.* at 539, 99 S. Ct. at 1874.

The Minnesota Supreme Court has stated that the government has a compelling interest in protecting the public from people with a substantial likelihood of committing sexual assault. *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994). Here, a court has already concluded that Semler is a sexually dangerous person and that indeterminate civil commitment is appropriate. As such, Semler's continued civil commitment during the COVID-19 pandemic is rationally related to the legitimate government goal of protecting

the public from sexual predators, and it therefore does not amount to unconstitutional punishment.

B. Semler's confinement does not violate his substantive-due-process rights because MSOP's actions do not shock the conscience.

For civilly committed individuals to demonstrate a violation of substantive due process, they must establish that the program's actions were conscience-shocking and violated a fundamental right. *Karsjens v. Piper*, 845 F.3d 394, 408 (8th Cir. 2017). Conscience-shocking is a high standard, as the program's actions must be "egregious or outrageous." *Id.* (quotation omitted). The conduct must be "so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* (quotations omitted).

We see no error in the district court's rejection of Semler's claimed due-process violation. There is no evidence in the record to substantiate Semler's claim that his continued confinement meets the high threshold to shock the conscience or violate a fundamental right. As set forth herein, the implementation of COVID-19 safety protocols by MSOP was reasonable in light of the substantial risk of harm presented by the pandemic.

Affirmed.