STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1122

State of Minnesota, ex rel. Gumdel Nygare Gilo,
Appellant,

vs.

Paul Schnell,
Commissioner of Corrections,
Respondent.

Filed May 3, 2021
Affirmed
Reyes, Judge

Rice County District Court
File No. 66-CV-20-773

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, Kevin Jonassen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Kalitowski, Judge.[*]

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

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from the district court's denial of his petition for a writ of habeas corpus, appellant argues that (1) the district court failed to recognize his protected liberty interest in remaining in phase II of the Challenge Incarceration Program (CIP) and (2) the Department of Corrections (DOC) violated his right to procedural due process because it failed to notify him that he could be held responsible for the conduct of a third party in his residence. We affirm.

FACTS

In March 2018, the district court sentenced appellant Gumdel Nygare Gilo to 60 months in prison for prohibited possession of a firearm. While in custody at the Minnesota Correctional Facility in St. Cloud, appellant applied for and was accepted into the CIP.

The CIP is a three-phase program created by the legislature "to prepare the offender for successful reintegration into society" through educational programs, a rigorous physical program, and vocational training. Minn. Stat. § 244.171 (2018). During phase I of the CIP, an offender remains at a correctional facility to receive training and must "successfully participate in all intensive treatment, education, and work programs" as set by the DOC. Minn. Stat. § 244.172, subd. 1 (2018). During phase II, the offender may live in the community under intensive supervision. *Id.*, subd. 2 (2018). Finally, phase III lasts until the DOC determines that the offender has successfully completed the program or until the offender reaches his supervised-release date, whichever happens first. *Id.*, subd.

3 (2018). If the offender completes the program first, the offender may be placed on supervised release for the remainder of the sentence. *Id.*

In June 2019, appellant began phase II of the CIP. Offenders entering phase II must sign a form containing the conditions of their CIP release. Relevant here are the conditions that appellant must: (1) "submit to any unannounced searches by the agent/designee of the offender's person, residence, possessions, cell phone, vehicle, or premises"; (2) "refrain from the use or possession of mood altering substances, including alcohol, or drug paraphernalia"; and (3) "refrain from purchasing, possessing, accessing, or controlling any type of firearm, ammunition, or dangerous weapon" and "must not be found in the presence of a firearm, including those found in a vehicle where the offender is also present."

During appellant's time in phase II, his supervising agent (the agent) noted that he had unauthorized contact with a victim and unauthorized visitors. The agent also suspected that he possessed marijuana based on observing a leafy green residue and what appeared to be marijuana seeds in his residence on two occasions. On one of those occasions, the agent warned appellant of his responsibility for the conduct of anyone in his residence. However, appellant never received a formal violation for this conduct.

In October 2019, appellant rented a residence and requested and received approval to have a roommate, A.C. Appellant's room was on the second floor while A.C.'s room was on the first floor. On November 14, 2019, the agent visited the residence and smelled marijuana. Appellant submitted to a urinalysis, which returned negative. The agent returned later that evening with additional law-enforcement officers and searched the

residence. The officers found two small bags of marijuana, two bottles of liquor, and a loaded 9mm handgun in A.C.'s room.

During the search of the residence, the agent requested that appellant allow her to search his cell phone, but he provided an incorrect passcode and entered the wrong passcode himself. Later, while the phone was still locked and appellant remained in jail, the agent saw a notification on the home screen revealing that someone tried to access appellant's Apple account. She obtained transcripts of appellant's jail calls and discovered that appellant had asked others to try to lock or reset his device.

The DOC served appellant with notice of three violations of his CIP release: (1) possessing mood-altering substances, (2) failing to submit to a search of his cell phone, and (3) accessing or being in the presence of a firearm. At the violation hearing, counsel represented appellant, and he denied all three alleged violations. Both the agent and appellant testified. The hearing officer found that appellant committed all three violations including "material violations when intoxicants . . . and a loaded firearm . . . were discovered in his residence." It also determined that he "failed to submit to a search of his cell phone by refusing to provide the access code/password to his agent."

Appellant administratively appealed, arguing that he cannot be held responsible for the conduct of another and that the violations regarding intoxicants and the firearm were not material because a third party committed them. The executive officer of the Hearings and Release Unit affirmed.

Appellant filed a petition for a writ of habeas corpus in district court, arguing that (1) he has a constitutionally protected liberty interest in phase II of CIP; (2) he cannot be

held accountable for the actions of another; and (3) the cell-phone-search violation was not material and therefore could not alone sustain the revocation. The district court denied the petition without an evidentiary hearing, concluding that appellant has no protected liberty interest in phase II of the CIP and that, even if he did, the DOC provided sufficient process. The district court also determined that a "material" violation is not required to sustain revocation of CIP release, and the hearing officer did not abuse its discretion by revoking appellant's CIP release. This appeal follows.

DECISION

In reviewing an order denying a petition for a writ of habeas corpus, we give the district court's factual findings "great weight" and "will uphold the findings if they are reasonably supported by the evidence." *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 794 (Minn. App. 2008). We review questions of law relating to a habeas corpus petition de novo. *Id*.

I. The district court did not err by affirming the hearing officer's revocation of appellant's CIP release because officers found appellant in the presence of a firearm.

The DOC "shall impose severe and meaningful sanctions" for CIP condition violations. Minn. Stat. § 244.171, subd. 4. It *must* revoke a CIP participant for certain violations, including "material violation[s] of . . . the rules of [the CIP]." *Id*., subd. 4(1). "Revocation is justified when there is enough evidence to satisfy the decision-maker that the conduct of the offender does not meet the conditions of his release." *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 27 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006);

see also Minn. Dep't of Corrs., *Policy No. 106.114 Hearings for Adult Offenders* (Sept. 4, 2018) (noting that standard of proof for violation hearings is preponderance of evidence).

Here, appellant's CIP conditions prohibited him from accessing or being found in the presence of a firearm. As an initial matter, "the burden of showing error rests upon the one who relies upon it." *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (quoting *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944). And a party forfeits a right by failing to timely assert it. *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015). Here, each decision-maker recognized that appellant's conditions prohibit him from being found in the presence of a firearm, and the executive officer explicitly affirmed the hearing officer's decision to revoke on the basis of presence. Yet, appellant argues only that he never accessed the firearm, and fails to raise any argument regarding whether officers found him in the presence of a firearm. Appellant therefore forfeited any challenge to his revocation on that basis.

Although appellant forfeited this argument, we acknowledge that the district court did not make an explicit finding that officers found appellant in the presence of a firearm. Instead, the district court affirmed the DOC's decisions, which included an explicit finding that officers found appellant in the presence of a firearm. The district court therefore implicitly affirmed that decision. In any event, we may affirm the district court on any basis supported by the record and the law. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009) (quoting Minn. R. Crim. P. 29.04, subd. 6). We therefore turn to whether the record supports revocation based on officers finding appellant in the presence of a firearm.

Neither caselaw nor the CIP conditions define "presence" in this context, but the dictionary definition of "presence" indicates that it is a broad concept. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 605 (Minn. 2016) (noting that we may look to dictionary definition when term is otherwise undefined). *Merriam-Webster* defines "presence" as "the part of space within one's immediate vicinity." *Merriam-Webster's Collegiate Dictionary* 982 (11th ed. 2014). "Immediate" means "being near at hand." *Id.* at 620. "Vicinity" means "the quality or state of being near; proximity" or "a surrounding area or district." *Id.* at 1393. A common understanding of "presence" therefore requires that appellant only be in the surrounding area or near a firearm to be in its presence.

Here, A.C.'s bedroom is connected to common areas in the home and was unlocked at the time of the search. Appellant remained in the residence at the time the officers found the firearm. The agent observed appellant close the door to the bedroom earlier on the evening of the search, drawing him into closer proximity to the bedroom and its contents. And officers found the firearm under a jacket on the bedroom floor, not locked away in a safe or closet. Additionally, on a prior occasion, the agent had verbally warned appellant of his responsibility for anything found in his residence. Appellant's CIP conditions required that he submit to unannounced searches of his entire residence. This condition is not limited to specific rooms, times, or property, thereby broadening the areas for which appellant is responsible in this particular context. These facts establish a violation by a preponderance of the evidence based on officers finding appellant in the presence of a firearm.

Finally, appellant did not dispute whether the firearm violation was material. Because appellant's underlying conviction was a firearm offense and his CIP conditions expressly prohibited him accessing or being found in the presence of a firearm, we discern no error in the district court's implicit affirmance of the hearing officer's materiality findings. We therefore conclude that the district court did not err by affirming the hearing officer's determination that appellant materially violated his CIP conditions.[1]

II. Appellant forfeited his lack-of-due-process argument.

Appellant argues that the DOC violated his procedural due-process rights because it failed to notify him that he bore responsibility for the conduct of a third party in his residence. The DOC argues that appellant forfeited this argument because he failed to raise it before the district court. We agree with the DOC.

On appeal, we ordinarily consider only the issues presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). And a party may not shift theories on appeal. *Id*. Here, appellant argued before both the hearing officer and the district court that he cannot be held accountable for the actions of a third party. But on appeal he argues that he *had no notice* that he could be held accountable for the actions of a third party. Because neither the hearing officer nor the district court considered

[1] Because one material violation sufficiently supports revocation, we need not address appellant's other two violations. *See* Minn. Stat. § 244.171, subd. 4(1) (stating that DOC must revoke CIP participant for material violation).

appellant's new argument, we have no decision on this issue to review. Appellant has forfeited his lack-of-due-process argument.[2]

Affirmed.

[2] Because appellant forfeited this argument, we need not address whether he has a protected liberty interest in phase II of the CIP.