

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0191

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL.
GERALD M. TURNER, JR.,**

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
GEORGE A. NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Gerald M. Turner, Jr. appeals from an order dismissing his declaratory judgment action. The issue is whether the trial court erred when it dismissed a declaratory judgment action which raised the same issue that was previously rejected in a different action between these parties and by the

Wisconsin Supreme Court. We conclude that the trial court properly dismissed Turner's declaratory judgment action because the issue was previously rejected in his sexual predator action and is rejected by controlling precedent. Therefore, we affirm.

In 1975, Turner was convicted of sexually molesting and murdering a nine-year-old child. For these crimes, he was sentenced to thirty-eight and one-half years in prison. On October 13, 1992, Turner was released on parole because he had reached his mandatory release date. On July 14, 1994, the State petitioned for Turner's detention as a sexually violent person under § 980.01(7), STATS. ("sexual predator action" or "*Turner I*"). A sexual predator petition must be filed within ninety days of the subject's release date. See § 980.02(2)(ag), STATS. Turner moved to dismiss the sexual predator action on various grounds, including the untimeliness of the State's petition. The *Turner I* trial court denied that motion, but dismissed *Turner I* because it concluded that ch. 980, STATS., was unconstitutional. The State appealed *Turner I*.

While the State's appeal in *Turner I* was pending, several similar sexual predator actions litigating the constitutionality of ch. 980, STATS., were pending before the Wisconsin Supreme Court. See *State v. Carpenter*, 197 Wis.2d 252, 541 N.W.2d 105 (1995); *State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115 (1995). Consequently, the *Turner I* appeal was stayed pending the Wisconsin Supreme Court's decisions in *Carpenter* and *Post*. *Carpenter* rejected the same issue Turner raised on the alleged untimeliness of the sexual predator petition under § 980.02(2)(ag), STATS. See *Carpenter*, 197 Wis.2d at 275, 541 N.W.2d at 114.

Section 980.02(2)(ag), STATS., requires that the subject of a sexual predator petition must be “within 90 days of discharge or release, on parole or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense....” Carpenter and Turner had been released on parole but reincarcerated as sexual predators. Upon that reincarceration, the Department of Corrections recalculated new parole dates. See *Carpenter*, 197 Wis.2d at 275, 541 N.W.2d at 114 (discussing *State ex rel. Parker v. Fiedler*, 180 Wis.2d 438, 509 N.W.2d 440 (Ct. App. 1993), *rev'd sub nom. State ex rel. Parker v. Sullivan*, 184 Wis.2d 668, 517 N.W.2d 449 (1994)). *Carpenter* held that when the State filed its sexual predator petition, Carpenter was within ninety days of his recalculated parole date. See *Carpenter*, 197 Wis.2d at 275, 541 N.W.2d at 114. Consequently, *Carpenter* conclusively disposed of the timeliness issue in *Turner I*. See *State v. Carviou*, 154 Wis.2d 641, 644-45, 454 N.W.2d 562, 564 (Ct. App. 1990).

Eight months after this issue was rejected in *Turner I*, Turner filed a declaratory judgment action (“*Turner II*”) raising the identical issue, namely to declare his mandatory release date.¹ The *Turner II* trial court dismissed Turner’s

¹ Turner contends that the issues he raised in *Turner II* were different from the issue that was rejected in *Turner I* because *Turner II* sought calculation of his release date under § 53.11, STATS., 1973, whereas *Turner I* involved ch. 980, STATS. We disagree because the substantive issue was the same.

Turner also contends that the attorney general should not be representing the State in this declaratory judgment action because this same attorney general previously refused to defend the Department of Corrections’ method of calculating good time credit in *State ex rel. Parker v. Fiedler*, 180 Wis.2d 438, 458-62, 509 N.W.2d 440, 448-49 (Ct. App. 1993), *rev'd sub nom. State ex rel. Parker v. Sullivan*, 184 Wis.2d 668, 517 N.W.2d 449 (1994). Turner recognizes the attorney general’s authority to represent the State under § 165.25, STATS., but contends that the attorney general should be precluded from asserting inconsistent positions. We are not persuaded that the attorney general’s position in this case is inconsistent with his position in *Parker*. Here, the attorney general is opposing a prohibited type of forum-shopping and urging the application of controlling precedent. He is not addressing the method of calculating an inmate’s mandatory release date.

declaratory judgment action “because the issues that [Turner is] raising here [in *Turner II*] insofar as they go to [Turner’s] release date and whether Chapter 980 would apply are matters which were litigated in another forum [*Turner I*], in which [Turner has] a clear remedy by appeal” The *Turner II* trial court reasoned that “the real key is at the time that [Turner] filed the motion for declaratory judgment, there was another action pending [*Turner I*] in which the same parties were involved and the identical issues are involved, and it’s being adjudicated. So, the declaratory judgment was inappropriate in that regard.” We agree.

Turner cannot circumvent an unfavorable ruling in a pending case by commencing another action to raise the identical issue under the guise of declaratory relief. Because Turner litigated this precise issue in the sexual predator action, the trial court correctly dismissed the declaratory judgment action in which Turner sought to collaterally attack the ruling which he could have attacked directly.² See *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 671, 239 N.W.2d 313, 323 (1976).

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Even if the *Turner II* trial court had not dismissed the declaratory judgment action because the same issue was pending in *Turner I* between these parties, the *Turner II* trial court would have been compelled to reject Turner’s substantive claim under *State v. Carpenter*, 197 Wis.2d 252, 541 N.W.2d 105 (1995).

