COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP445 **Cir. Ct. No. 2004CV1721**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. JAMES R. MATLOUCK,

PETITIONER-APPELLANT,

V.

RANDALL R. HEPP AND MOLLY SULLIVAN OLSON,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. James Matlouck appeals a circuit court order which affirmed a prison programming decision on certiorari review. He claims prison officials violated his constitutional rights by designating him in need of sex

offender treatment even though he has not been convicted of a sexual offense. We disagree, and affirm for the reasons discussed below.

BACKGROUND

¶2 Matlouck is currently in prison on three burglary convictions. It is undisputed that he has never been convicted of a sexual offense, although a charge that he had sexually assaulted his daughter was dismissed after the daughter and her mother left town. The Department of Corrections Psychological Services Unit recommended that Matlouck complete sex offender treatment and a denier's program while in prison based on Matlouck's own prior admissions in group therapy that he had sexually assaulted his daughter and others, as well as a medical report and a police report relating the daughter's account of the molestation underlying the dismissed charge. The program review committee at Jackson Correctional Institution followed that recommendation. Matlouck sought administrative review, and then statutory certiorari relief.

DISCUSSION

¶3 Our certiorari review of administrative proceedings is confined to the administrative record. WIS. STAT. § 227.57(1) (2003-04).[1] We reverse only if we determine that the agency acted outside of the discretion accorded to it by law or otherwise acted contrary to a constitutional or statutory provision or the agency's own rules or practice. WIS. STAT. § 227.57(8). We may not substitute our judgment for that of the agency as to the weight of the evidence on any

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

disputed finding of fact, so long as the fact is supported by substantial evidence in the record. WIS. STAT. § 227.57(6).

¶4 Matlouck first claims that prison officials were not authorized to impose any programming requirements on him. However, WIS. STAT. §§ 301.03(2) and 301.06 plainly give the Department authority to supervise prisoners and develop education and prevention programs for them.

¶5 Matlouck next claims that imposing a requirement for sex offender treatment on him, when he has never been convicted of a sexual offense, violates either his procedural or substantive due process rights. A procedural due process analysis involves a two-part inquiry, asking first "'whether there exists a liberty or property interest which has been interfered with by the State,'" and if so, "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" ***State v. Stenklyft***, 2005 WI 71, ¶64, 281 Wis. 2d 484, 697 N.W.2d 769 (citation omitted). A substantive due process analysis considers whether state action is arbitrary to the extent that it "'shocks the conscience'" or "'interferes with rights implicit in the concept of ordered liberty.'" ***State v. Schulpius***, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495, *cert. denied*, 126 S. Ct. 2042 (2006) (citation omitted). Where there is a fundamental liberty interest at stake, substantive due process requires a statute or administrative rule to be narrowly tailored to achieve a compelling state interest. *See* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831.

¶6 Matlouck argues that designating him in need of sex offender treatment implicates a liberty interest because his refusal to participate in the

specified programs will influence his prison security classification.[2] It is well settled, however, that prisoners have no liberty interest in retaining a specific security classification. *See generally* ***Meachum v. Fano***, 427 U.S. 215, 224-25 (1976) (prisoners have no constitutionally protected interest in avoiding transfer to a maximum security prison with more burdensome conditions); ***Thomas v. Ramos***, 130 F.3d 754, 760 (7th Cir. 1997) (prisoner has no liberty interest in remaining in general population). Rather, liberty interests in the prison context are limited to freedom from restrictions that are atypical and significant in relation to ordinary incidents of prison life. ***Sandin v. Conner***, 515 U.S. 472, 484 (1995). In short, Matlouck has not persuaded us that he has any protected liberty interest in avoiding the designation that he needs certain treatment programs because his refusal to participate in those programs will not change his release date under the TIS-II scheme or subject him to any atypical or significant restrictions beyond the ordinary incidents of prison life. *See* ***Grennier v. Frank***, 453 F.3d 442, 444 (7th Cir. 2006) (refusing to grant parole based on uncharged sex offenses did not violate due process because inmate had no liberty interest in discretionary parole determination); ***Neal v. Shimoda***, 131 F.3d 818, 830-31 (9th Cir. 1997) (requiring an inmate to participate in sex offender treatment implicated a liberty interest only where refusal to comply would affect his parole eligibility).

[2] Matlouck further claims that he has been denied entry into the challenge incarceration program based on his refusal to participate in sex offender treatment. As the respondents correctly point out, however, Matlouck was not eligible for that program based on his age. *See* WIS. STAT. § 302.045(2)(b) (2001-02) (setting age limit at 30 years at time Matlouck was convicted and sentenced) and 2003 Wis. Act 33, §§ 2504 and 9310 (providing that subsequent elevation of eligibility age was not retroactive). In any event, Matlouck has not shown that he would have any protected liberty interest in participating in the challenge incarceration program, even if he were eligible to do so, since that is a discretionary program.

¶7 Because Matlouck has not demonstrated that he has a protected liberty interest at stake—much less a fundamental liberty interest—we need not address what procedures prison officials followed in making the determination that Matlouck was in need of sex offender treatment, or whether those procedures were narrowly tailored to advance a compelling state interest. For due process purposes, it is sufficient to note that prison treatment programs, including sex offender treatment, are rationally related to the legitimate penalogical goal of rehabilitation, and that relying on psychological reports which incorporate statements made by an inmate in past therapy sessions as well as information from other sources is a rational means of evaluating an inmate's treatment needs.

¶8 Matlouck next complains that requiring him to participate in sex offender treatment would violate his Fifth Amendment right to avoid self-incrimination. However, he has not provided any basis to show that any statements he made in treatment would or could be admitted in a future criminal prosecution against him. We note that in ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶¶19-22 & n.10, 27, 257 Wis. 2d 40, 654 N.W.2d 438, the court held that revocation of probation for refusing to admit the crime of conviction violated the Fifth Amendment where appeal rights had not expired and the defendant was required to sign a release providing that statements made in treatment could be used in future court proceedings. The court further explained that the immunity rule of ***State v. Evans***, 77 Wis. 2d 225, 252 N.W.2d 664 (1977), applies to any inculpatory statements regarding the crime of conviction made in such mandatory treatment sessions, but expressly left open the question whether the immunity rule extends to statements about uncharged conduct.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.