COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1976 **Cir. Ct. No. 2003CF539**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD L. LYNCH, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Gerald Lynch, Jr., appeals an order denying him WIS. STAT. § 974.06 (2005-06)[1] relief from a conviction for homicide by intoxicated use of a vehicle, and two counts of fleeing from an officer resulting in bodily harm. We affirmed his conviction in a prior appeal. *See* ***State v. Lynch***, 2006 WI App 231, 297 Wis. 2d 51, 724 N.W.2d 656, *review denied*, 2007 WI 59, 299 Wis. 2d 326, 731 N.W.2d 636. His postconviction motion in this proceeding alleged that he received ineffective representation from the attorney who represented him in his first appeal. Lynch should have brought his claim by filing a petition for a writ of habeas corpus in this court, commonly known as a ***Knight*** petition. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Nevertheless, to dispose of this case efficiently, we decide the merits of Lynch's ineffectiveness claim. We affirm.

¶2 A defendant convicted of a crime and sentenced to prison under WIS. STAT. ch. 940, entitled "Crimes Against Life and Bodily Security," may not obtain early release from initial confinement under the earned release program. WIS. STAT. §§ 302.05(3)(a)1. and 973.01(3g). Consequently, the sentencing court declared Lynch ineligible for the program because homicide by intoxicated use of a vehicle is a ch. 940 crime. WIS. STAT. § 940.09.

¶3 In his first appeal, Lynch contended that WIS. STAT. §§ 302.05(3)(a)1. and 973.01(3g) violated his constitutional rights to equal protection and substantive due process because they do not exclude from earned release a person convicted of driving while intoxicated without causing a death or

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

great bodily harm. We concluded that the earned release statutes did not violate his constitutional rights because the legislature had a rational basis for excluding persons convicted of crimes under WIS. STAT. ch. 940 from the earned release program. ***Lynch***, 297 Wis. 2d 51, ¶18.

¶4 In this proceeding, Lynch alleged that counsel provided inadequate representation because he should have challenged the constitutionality of WIS. STAT. §§ 302.05(3)(a)1. and 973.01(3g) on other grounds. In Lynch's view, counsel should have based his equal protection and due process argument on the different treatment accorded those convicted of WIS. STAT. ch. 940 offenses, who are excluded from earned release, and those convicted of comparable crimes involving deaths or great bodily harm in other chapters, who are not excluded from the program. Essentially, appellate counsel argued that no rational basis existed to distinguish between offenders who commit the same act but with different consequences. In Lynch's view, counsel should have argued that no rational basis existed to distinguish between offenders who commit different acts but with the same consequences. After hearing testimony from appellate counsel, the trial court denied Lynch's motion, resulting in this appeal.

¶5 A defendant has the right to effective counsel on appeal. ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784. Counsel is not effective if he/she fails to raise an issue on appeal that would have succeeded had it been raised. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369. Therefore, to meet his burden in this case, Lynch must show that counsel could have prevailed on the alternative constitutional argument he advances.

¶6 The "rational basis" test applies to challenges involving differences in criminal penalties. ***Lynch***, 297 Wis. 2d 51, ¶14. Under that test, statutes violate constitutional protections only if they create arbitrary classifications with no rational relationship to a legitimate government interest. ***Id.***, ¶13. If the challenged statutes have more than a speculative tendency in furthering a valid legislative purpose, they do not violate equal protection or due process. ***Id.***, ¶17. Thus, the legislature need not choose the best or wisest means to achieve its goals. ***Id.*** Furthermore, the legislature need not expressly state the basis for its classification, if the reviewing court can conceive of facts on which the legislation could be reasonably based. ***State v. Radke***, 2003 WI 7, ¶11, 259 Wis. 2d 13, 657 N.W.2d 66.

¶7 Lynch has failed to demonstrate that counsel would have succeeded on his alternative constitutional challenge. Lynch argues, essentially, that all criminal acts that cause death or great bodily harm must be punished similarly. However, there is no authority for Lynch's proposition. If there is a rational basis for doing so, the legislature may treat certain criminal acts as more serious than others, and impose harsher sanctions for those acts it considers more serious. *See* ***id.***, ¶18. The frequency of deaths and great bodily harm caused by drunk drivers provides a rational basis for treating Lynch's offense more seriously than certain other acts causing death or great bodily harm, and excluding offenders from the earned release program is a rational means of imposing a more serious punishment, because doing so increases the prison time that the excluded offenders must serve.

¶8 Lynch also contends that appellate counsel should have argued that the prosecutor's discretion to charge the defendant with a crime that excludes earned release, rather than one that permits it, violates the separation of powers

doctrine by removing the sentencing court's discretion. However, that argument is meritless and counsel cannot be faulted for omitting it from the appeal. A prosecutor's discretion in charging decisions is wide and approaches the quasi-judicial. *See* ***County of Kenosha v. C&S Management, Inc.***, 223 Wis. 2d 373, 400, 588 N.W.2d 236 (1999). There is no authority for the proposition that the prosecutor's charging discretion infringes on the sentencing authority of the courts.

By the Court.—Order affirmed.

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