COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1480 **Cir. Ct. No. 02-CV-760**

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

STATE OF WISCONSIN EX REL. MARK HUGHES,

PETITIONER-APPELLANT,

V.

STEPHEN PUCKETT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed and cause remanded.*

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

¶1 DEININGER, J. Mark Hughes, a Wisconsin inmate incarcerated in Minnesota, appeals an order dismissing his petition for a writ of certiorari. In his petition, he sought review of a decision by Department of Corrections officials regarding his "risk rating" and security classification. The circuit court, without ordering a return of the administrative record or requiring a response to the

petition, dismissed Hughes's petition under WIS. STAT. § 802.05(3)(b) (1999-2000)[1] after concluding that it failed to state a claim on which relief could be granted. Because Hughes is not a "prisoner" within the meaning of § 802.05(3), we conclude the court erred in dismissing his petition under that subsection. Accordingly, we reverse and remand for further proceedings on Hughes's petition.

BACKGROUND

¶2 Because we do not reach the merits of Hughes's petition, a detailed recitation of the underlying facts is not necessary to our disposition. Hughes filed a petition for a writ of certiorari in which he averred that he was an inmate at the Prairie Correctional Facility, Appleton, Minnesota, where he had been placed since January 7, 2000. His petition sought review of a Department of Corrections "Program Review Committee" decision which allegedly increased his "custody level" and rendered him "ineligible for minimum security placement." Hughes claimed in his petition that the committee's decision, and its affirmance on administrative review by Stephen Puckett, the department's "Director, Office of Offender Classification," was "arbitrary, oppressive and unreasonable," in violation of department rules and a violation of his right to due process.

¶3 The next item in the record following Hughes's petition is the unsigned writ which Hughes requested the court to issue to Puckett commanding him to make a certified return of the administrative record. Immediately following the unsigned writ is the trial court's "Memorandum Decision Dismissing Action," in which the court concluded that "[d]ismissal under [WIS. STAT.]

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. The text of WIS. STAT. § 802.05(3)(a) and (b) is set out below in footnote 2.

§ 802.05(3)(b)(4) … is appropriate because petitioner has failed to state a claim upon which relief can be granted."[2] The court also entered a standard-form "Dismissal Order (Prisoner Litigation) Under 801.02(7)(d)," which included, among other things: (1) a finding that the case "is a proceeding by a prisoner"; (2) an answer or responsive pleading from Puckett "is not required"; and (3) the "dismissal constitutes a single dismissal within the meaning of [WIS. STAT.] § 801.02(7)(d)."[3]

---

[2] WISCONSIN STAT. § 802.05(3)(a) and (b) provide the following:

> (a) A court shall review the initial pleading as soon as practicable after the action or special proceeding is filed with the court *if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02(7)(a)2*.
>
> (b) The court may dismiss the action or special proceeding under par. (a) without requiring the defendant to answer the pleading if the court determines that the action or special proceeding meets any of the following conditions:
>
> 1. Is frivolous, as determined under s. 814.025 (3).
>
> 2. Is used for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.
>
> 3. Seeks monetary damages from a defendant who is immune from such relief.
>
> 4. Fails to state a claim upon which relief may be granted.

(Emphasis added.)

[3] WISCONSIN STAT. § 801.02(7)(d) creates what is commonly referred to as the "three strikes" feature of the Wisconsin Prisoner Litigation Reform Act (WPLRA):

(continued)

¶4 Hughes moved for reconsideration. In his motion, Hughes asserted that he "is a pro se litigant, that is housed in an out of state facility who paid his full filing fee for this action," and he cited ***State ex rel. Speener v. Gudmanson***, 2000 WI App 78, 234 Wis. 2d 461, 610 N.W.2d 136, for the proposition that his action did not "fall under [the Wisconsin Prisoner Litigation Reform Act (WPLRA)] guidelines" because he is an out-of-state inmate. The court denied Hughes's motion for reconsideration but did not address Hughes's claims that his action was not subject to the WPLRA.[4]

ANALYSIS

¶5 Hughes opens his argument in this court by renewing his contention that because he is incarcerated out-of-state, his action is not governed by the WPLRA, citing ***Speener***. He argues only that "the trial court erred when assessing a strike against" him under WIS. STAT. § 801.02(7)(d), not that the court's dismissal under WIS. STAT. § 802.05(3) was erroneous for the same reason—the

---

> If the prisoner seeks leave to proceed without giving security for costs or without the payment of any service or fee … the court shall dismiss any action or special proceeding, including a petition for a common law writ of certiorari, commenced by any prisoner if that prisoner has, on 3 or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a petition for a common law writ of certiorari, that was dismissed by a state or federal court for any of the reasons listed in s. 802.05(3)(b)1. to 4.

[4] The court noted in its decision denying reconsideration that it was "difficult to discern petitioner's legal arguments from his 14 page Motion for Reconsideration." We do not disagree with the court's observation. Although Hughes made the quoted assertion regarding the non-applicability of the WPLRA at the beginning of his motion, he did not return to the issue. Rather, he devoted the remainder of his motion and some sixty pages of attachments to a discussion of the merits of his claims of error regarding the decision for which he sought review.

fact that Hughes is not a "prisoner" as defined by the WPLRA. Puckett acknowledges our holding in ***Speener*** and concedes "that a strike cannot be assessed against [Hughes] since he is incarcerated out of state." Like Hughes, however, Puckett does not address whether the circuit court's dismissal under § 802.05(3) was proper given Hughes's status as an out-of-state inmate.

¶6 We addressed in ***Speener*** the definition of "prisoner" for purposes of the applicability of the provisions of the WPLRA: "'Prisoner' means any person who is incarcerated, imprisoned or otherwise detained in a correctional institution or who is arrested or otherwise detained by a law enforcement officer." WIS. STAT. § 801.02(7)(a)2. We concluded after examining the related statutory definition of "correctional institution" that the legislature intended "to limit the definitions of 'prisoner' and 'correctional institution' to Wisconsin." ***Speener***, 2000 WI App 78 at ¶15. Accordingly, we concluded that a Wisconsin inmate housed in "an out-of-state county jail" was not a "prisoner" under the definition in § 801.02(7)(a)2, thus rendering the WPLRA filing fee provisions inapplicable. ***Id***. at ¶16.

¶7 We agree with Hughes and Puckett that our analysis in ***Speener*** is relevant here. Hughes is not only incarcerated outside the state of Wisconsin, but he appears to be in a correctional facility operated by the Corrections Corporation of America. Hughes, like Speener, is therefore not a "prisoner" for purposes of the WPLRA. *See* ***id***. at ¶14 (concluding legislature "unambiguously" intended "to exclude privately-run facilities from the definition of 'correctional institution' in WIS. STAT. § 801.02(7)(a)1").

¶8 Unlike the parties, however, we do not end our analysis with a conclusion that the circuit court erred in assessing a "strike" under WIS. STAT.

§ 801.02(7)(d). The circuit court concluded in its memorandum decision that it was authorized under WIS. STAT. § 802.05(3) to undertake a sua sponte, post-filing review of Hughes's petition. The court's dismissal order was specifically grounded on § 802.05(3)(b)4. Section 802.05(3), however, requires a post-filing court review, and authorizes a pre-response dismissal, only "if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02(7)(a)2." Section 802.05(3)(a). As we have explained, Hughes is not a "prisoner" as defined by § 801.02(7)(a)2, and thus the court erred in proceeding under § 802.05(3) to dismiss his petition.

¶9 The State does not dispute Hughes's assertions in both the trial court and this court that he paid the full circuit court filing fee when he filed his petition. We find nothing in the record that would indicate otherwise. Thus, just as WIS. STAT. § 802.05(3) does not apply to Hughes's petition, neither does WIS. STAT. § 814.29(1)(c), which authorizes the circuit court to engage in a pre-filing determination of whether an actionable claim has been stated for purposes of a fee waiver. *See, e.g.*, ***State ex rel. Luedtke v. Bertrand***, 220 Wis. 2d 574, 578, 583 N.W.2d 858 (Ct. App. 1998), *aff'd*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999).

¶10 Finally, we note that Puckett has not argued that, even if WIS. STAT. § 802.05(3) does not apply to Hughes's petition, the circuit court possessed the inherent power to dismiss Hughes's petition sua sponte for failure to state a claim. Even if he had done so, however, we would be reluctant to affirm the circuit court's order on that basis. The circuit court's action was plainly premised on its belief that § 802.05(3) required it to conduct a post-filing review of Hughes's pleading, and that the cited statute authorized it to dismiss sua sponte for failure to state a claim. We cannot conclude that the court, had it recognized that WIS.

STAT. § 809.05(3) did not apply, would have dismissed Hughes's petition without ordering a return of the administrative record or receiving a motion to dismiss from Puckett.[5]

CONCLUSION

¶11 For the reasons discussed above, we reverse the appealed order and remand for further proceedings on Hughes's petition.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[5] We also note that there is no indication in the record that the circuit court provided Hughes notice or the opportunity to be heard before it dismissed Hughes's certiorari petition, which we have recently concluded constitutes a violation of a petitioner's right to due process. *See* ***State ex rel. Schatz v. McCaughtry***, 2002 WI App 167, 256 Wis. 2d 770, 650 N.W.2d 67, *review granted,* 2002 WI 121, 257 Wis. 2d 115, 653 N.W.2d 888 (Wis. Sep. 26, 2002) (No. 01-0793). We acknowledge that the court did hear from Hughes as to why his petition should not have been dismissed when it considered his motion for reconsideration. Because we conclude, however, that the court erred in dismissing Hughes's petition on the basis of WIS. STAT. § 802.05(3), we do not address whether Hughes's opportunity to argue for reconsideration cured any due process violation in the court's sua sponte dismissal.