COURT OF APPEALS DECISION DATED AND FILED

February 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2009AP2808-CR

Cir. Ct. No. 1980CF63

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENE CESPEDES-TORRES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Lene Cespedes-Torres, pro se, appeals orders denying a motion for sentence modification and a motion for reconsideration. Cespedes-Torres argues that: (1) he was denied a fair and impartial parole hearing; (2) "newly adopted" parole rules violate the ex post facto clause; and

(3) he is entitled to a "correction" of his sentence. We reject his arguments and affirm.

¶2 Cespedes-Torres was convicted by a jury in 1981 for the rape and murder of Bernice Taylor. He was sentenced to life imprisonment for first-degree murder and five years consecutive for second-degree sexual assault. On July 28, 2009, Cespedes-Torres filed a motion to modify his sentence, alleging the existence of new factors. The circuit court denied the motion and a subsequent motion for reconsideration. Cespedes-Torres now appeals.

¶3 Cespedes-Torres first argues that he was denied a fair and impartial parole hearing. His arguments rely on four documents: (1) a letter dated April 28, 1994, from then-governor Tommy Thompson to then-Secretary of the Department of Corrections Michael J. Sullivan; (2) a memorandum from Sullivan to Thompson of the same date; (3) a letter from then-State Representative Frank Lasee dated August 1, 2002, to inmate Roger VanderLogt; and (4) a September 5, 2006, letter addressed to inmate Marvin Watford and signed by LaKeshia Myers, a legislative aide to State Senator Lena Taylor.

¶4 At the outset, we note that in the circuit court Cespedes-Torres sought relief on the basis of these documents, but not on the legal grounds presented on appeal. Accordingly, he has forfeited the issues on appeal, as we "'will not … blindside trial courts with reversals based on theories which did not originate in their forum.'" *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted). But even if we were to reach the merits, Cespedes-Torres's arguments would fail.

¶5 The documents submitted by Cespedes-Torres do not support his argument that he was denied a fair and impartial parole hearing. First of all,

Cespedes-Torres has failed to show that the individuals conducting his parole reviews considered any of these documents. And, even if he could show a connection between these documents and the parole body, Cespedes-Torres has not shown that the parole body did anything unconstitutional or improper. Cespedes-Torres has regularly participated in parole reviews since 1992. Nothing in the record suggests that he received anything less than fair process in those parole reviews. As the circuit court correctly observed, Cespedes-Torres's parole denials were based at least partially on his numerous conduct violations while in prison.

¶6 Moreover, we recently reiterated that the 1994 Thompson letter is not a new factor warranting sentence modification. *See* ***State v. Wood***, 2007 WI App 190, ¶11, 305 Wis. 2d 133, 738 N.W.2d 81. We also previously held that the Thompson letter, "although written by the governor [to the DOC Secretary], simply did not carry the force of law." ***State v. Delaney***, 2006 WI App 37, ¶17, 289 Wis. 2d 714, 712 N.W.2d 368.

¶7 In addition, the Thompson letter refers only to Wisconsin's mandatory release law, not to parole eligibility. *See* ***id.***, ¶16. Thompson asked DOC "to block the release of violent offenders who have reached their mandatory release date." Cespedes-Torres is serving a life sentence, and is therefore not entitled to mandatory release. *See* ***Parker v. Percy***, 105 Wis. 2d 486, 491-92, 314 N.W.2d 166 (Ct. App. 1981). Mandatory release and discretionary parole eligibility are two different things. *See* ***Delaney***, 289 Wis. 2d 714, ¶16. Cespedes-Torres does not have a protectible liberty interest in discretionary parole under Wisconsin law. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶7, 246 Wis. 2d 814, 632 N.W.2d 878. Cespedes-Torres fails to show that Thompson's

urgings on the issue of mandatory release could have had an impact on Cespedes-Torres's eligibility for parole.

¶8 It is also unclear from the face of the other documents submitted by Cespedes-Torres what in particular was being discussed. The Lasee letter refers to "policy change." However, a letter from a legislator is not, on its own, adequate evidence of what parole policies were in 2002. The letter does not suggest that Cespedes-Torres was not provided due process in 2002, and any applicability to Cespedes-Torres's 1981 life sentence has not been established.

¶9 The Myers letter states that "[a]s of right now … all persons convicted of crimes must serve the entirety of their sentences." This is apparently a reference to the truth-in-sentencing laws in effect in 2006 when the letter was written. There is no indication Myers was thinking about the previous regime of indeterminate sentencing under which Cespedes-Torres was sentenced.

¶10 Cespedes-Torres next argues that "newly adopted" parole rules violate the ex post facto clause, relying primarily on the Myers letter. However, Cespedes-Torres has not shown that there was any legal change in parole laws affecting his parole eligibility, and a letter written by the aide to a state senator does not carry the force of law. In addition, the Myers letter did not suggest the creation or adoption of new parole rules, and did not even imply any legal change that would have an impact on Cespedes-Torres's 1981 sentence. Cespedes-Torres has shown no ex post facto violation. *See* ***Delaney***, 289 Wis. 2d 714, ¶24.

¶11 Finally, Cespedes-Torres argues he is entitled to a "correction" of his sentence. He contends that the Wisconsin sentencing statute applicable at the time of his sentencing precluded his sexual assault conviction from being imposed consecutively. However, it is clear that the statute allowed the sentencing court to

impose consecutive sentences for separate convictions that were part of the same prosecution. *See* WIS. STAT. § 973.15(2) (1979-80).

¶12 Cespedes-Torres also relies on a fragment from WIS. STAT. § 973.15(1) (1979-80), stating that "all sentences commence at noon on the day of sentence." Cespedes-Torres contends that this means both his murder and sexual assault sentences were required to begin on the day of sentencing. However, reading the statute in context confirms that the court may order two or more sentences imposed on a single day to run consecutive to each other. Each successive sentence does not begin on the day of sentencing, but on the day the previous sentence expires. *See* § 973.15(2) (1979-80). Cespedes-Torres's argument would result in absurdity, since all sentences imposed on the same day would necessarily be concurrent. Cespedes-Torres is not entitled to a "correction" of his sentence.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).