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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

Corrected as to ¶6, March 30, 2016
March 8, 2016

To:

Hon. Andrew P. Bissonnette
Circuit Court Judge
Justice Facility
210 West Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

David E. Bowers 289231
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2015AP1200-CR State of Wisconsin v. David E. Bowers (L.C. # 2009CF276)

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

David E. Bowers appeals pro se an order denying his motion for positive adjustment time (PAT) under WIS. STAT. § 973.198 (2013-14).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On March 30, 2010, Bowers was sentenced to two years' initial confinement and two years' extended supervision on his conviction for battery by a prisoner, a violation of WIS. STAT. § 940.20(1) (2009-10) and a class H felony. Bowers petitioned the circuit court for PAT under WIS. STAT. § 973.198. Section 973.198 preserves a prisoner's opportunity for early release based on PAT a prisoner would have earned between October 1, 2009, and August 3, 2011, the date the provisions allowing for early release were repealed. *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶3, 7, 353 Wis. 2d 520, 846 N.W.2d 820.

The circuit court denied Bowers' petition concluding that Bowers had not served any time on this sentence between October 1, 2009, and August 3, 2011. Bowers does not challenge the circuit court's factual determination that he had not served any portion of his sentence during the applicable period.² We could affirm on that basis alone, because WIS. STAT. § 973.198 does not apply when no portion of the sentence was served between October 1, 2009, and August 3, 2011. However, to avoid a future potential ex post facto challenge we now address *Singh*. Under *Singh*, if at the time of the crime a prisoner is eligible to earn PAT and to petition for early release under WIS. STAT. §§ 302.113(9h) and 304.06(1)(bg)3. (2009-10), those provisions may apply to the prisoner as if they had not been repealed.³ *Singh*, 353 Wis. 2d 520, ¶¶18, 30.

² Bowers' appellant's brief asserts that as a matter of equal protection he is entitled to earn positive adjustment. His argument is undeveloped and we do not address it. *Estrada v. State*, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999).

³ *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶19, 353 Wis. 2d 520, 846 N.W.2d 820, concluded that the elimination of PAT after August 3, 2011, violates the constitutional prohibitions of ex post facto laws. As we explain here, Bowers was not eligible to earn PAT and *Singh* has no application to Bowers' sentence.

Thus, we consider whether the order denying the motion for PAT can be affirmed on other grounds. *See State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

The threshold inquiry here is whether Bowers is eligible to earn PAT and petition for early release under WIS. STAT. §§ 302.113(9h) and 304.06(1)(bg)3. (2009-10). The application of a statute to a particular set of facts is a question of law. *State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

Under WIS. STAT. § 302.113(2)(b) (2009-10), an inmate is eligible to earn PAT if sentenced for “a misdemeanor or for a Class F to Class I felony that is not a violent offense, as defined in s. 301.048(2)(bm)1.” *See also* § 302.113(9h)(c)1. (a person is eligible for sentence modification based on PAT if the person “is serving the confinement portion of a bifurcated sentence for a misdemeanor or a Class F to Class I felony that is not a violent offense, as defined in s. 301.048(2)(bm)1.”). Included within the definition of a violent offense under WIS. STAT. § 301.048(2)(bm)1. (2009-10), is a crime committed under WIS. STAT. § 940.20. Bowers committed a crime under § 940.20 and is not eligible to earn PAT or petition for early release under § 302.113(9h).

Bowers’ eligibility for PAT is governed by WIS. STAT. § 304.06(1)(bg)1. (2009-10) (a person sentenced for “a Class F to Class I felony that is a violent offense” may earn PAT). However, that section does not apply to a person “who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.” Sec. 304.06(1)(bg)1.f. The same limitation is placed on petitions for early release under § 304.06(1)(bg)3. Bowers’ sentence in this case was made consecutive to any other sentence he was then serving. When he was sentenced, he was then serving three years and

seven days of reconfinement time imposed October 14, 2008, on an Outagamie County sentence for a conviction of battery to a law officer, a class D felony. Thus, Bowers is a person “who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.” He is not eligible to earn PAT under § 304.06(1)(bg)1., or petition for early release under § 304.06(1)(bg)3.

Bowers’ petition for PAT was properly denied.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals