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DISTRICT IV

February 9, 2017

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

2015AP1871

Jesse Hardy Swinson v. Timothy Douma (L.C. # 2014CV55)

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

Jesse H. Swinson appeals an order denying a petition for writ of certiorari. 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 (2015-16).¹ We affirm.

Swinson was sentenced to 29 years of imprisonment for three counts of theft by false representation and one count of bail jumping. Swinson was sentenced in 1999, and the

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The statutes are unchanged from the statutory language in effect at the time of the circuit court's order.

underlying thefts were committed in 1987 through 1989.² This appeal concerns the denial of Swinson's discretionary parole application.

We first address the nature of Swinson's petition and this appeal. In his initial filing, Swinson characterized his action as a habeas corpus petition or an administrative review under WIS. STAT. ch. 227. It is neither.

While this matter was pending, the supreme court denied a similar petition for writ of habeas corpus filed by Swinson. The circuit court then quashed a previously granted petition for writ of habeas corpus. Given the supreme court's action, the circuit court's decision to quash the writ of habeas corpus was proper. Additionally, the denial of a petition for discretionary parole cannot be reviewed in a WIS. STAT. ch. 227 proceeding. *Coleman v. Percy*, 96 Wis. 2d 578, 587, 292 N.W.2d 615 (1980). A decision of the parole commission is reviewable by common law certiorari. *State ex rel. Britt v. Gamble*, 2002 WI App 238, ¶15, 257 Wis. 2d 689, 653 N.W.2d 143. Thus, the circuit court properly treated Swinson's filing as a petition for certiorari review of the parole commission's denial of discretionary parole.

On certiorari review, this court is limited to determining: (1) whether the commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. See *Coleman*, 96 Wis. 2d at 588. Swinson has the burden of proving by a preponderance of the evidence that the actions of the parole commission were arbitrary and

² See *State v. Swinson*, 2003 WI App 45, 261 Wis. 2d 633, 660 N.W.2d 12.

capricious. *See State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d 878. If Swinson fails to sustain his burden, we will not interfere with the commission's decision. *See id.*

All of Swinson's arguments stem from his belief that he is entitled to parole under WIS. STAT. § 302.05. Swinson's briefs are convoluted and largely indecipherable. The State's brief, however, greatly assisted us in figuring out Swinson's arguments.³

WISCONSIN STAT. § 302.05 establishes a "substance abuse program" under which the sentence of a person, who is serving a bifurcated sentence and who was declared eligible for the program by the sentencing court, is modified upon successful completion of a substance abuse treatment program. WIS. STAT. § 302.05(1) and (3)(a)2. and (b). Because Swinson is not serving a bifurcated sentence, his eligibility for the program is determined by the Department of Corrections. *See* WIS. ADMIN. CODE § DOC 302.39(3)(a). The department's determination is discretionary and is guided by WIS. ADMIN. CODE § DOC 302.39(4).

Swinson contends that he is entitled to release under WIS. STAT. § 302.05 because he has successfully completed all programs he was eligible for. Swinson, however, was determined ineligible for the substance abuse program because he did not have an alcohol or other drug abuse treatment need. Swinson has not shown that the department erroneously exercised its discretion when it made that determination.

³ We agree with the State that Swinson's argument that his sentence was unfair is not properly within the scope of certiorari review. That claim should have been raised in the appeal from his conviction. *See* WIS. STAT. RULE 809.30 and WIS. STAT. § 973.19.

Swinson argues that his due process rights have been violated. The existence of a liberty interest is a prerequisite to a viable due process claim. See *DeTomaso v. McGinnis*, 970 F.2d 211, 213-14 (7th Cir. 1992). Release on discretionary parole is discretionary with the department. See WIS. STAT. § 304.06(1)(b). The possibility of discretionary parole does not create a protectible liberty interest. See *Gendrich*, 246 Wis. 2d 814, ¶7. Therefore, denial of discretionary parole to Swinson does not violate due process.

Swinson argues that the parole commission violated the ex post facto clause when it denied him parole. Generally, the ex post facto clause⁴ bars sanctions by the legislature that “make[] more burdensome the punishment for a crime[] after its commission.” *State v. Thiel*, 188 Wis. 2d 695, 700, 524 N.W.2d 641 (1994) (quoted source omitted). In the context of parole, the inquiry is not on whether a legislative change has affected a person’s opportunity for discretionary parole, but rather “on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.” *California Dep’t of Corrs. v. Morales*, 514 U.S. 499, 506 n.3 (1995). The criteria for discretionary parole remain unchanged. Compare WIS. ADMIN. CODE § PAC 1.06(16) (2010) with WIS. ADMIN. CODE § HSS 30.05(7) (1984). Even if the criteria had changed, no ex post facto violation would have occurred because the commission retains the discretion to apply the criteria as it sees fit in each individual case.

Swinson argues that the commission violated his equal protection rights because he is unable to fully participate in the substance abuse program established by WIS. STAT. § 302.05. Swinson cannot establish an equal protection violation. “Equal protection does not require that

⁴ U.S. CONST. art. I, §§ 9 & 10; WIS. CONST. art. I, § 12.

all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” *State v. Post*, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966)). When a statutory classification does not implicate a suspect class or fundamental interest, the classification will be upheld if there is any rational basis for the classification. *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986).

Swinson is serving an indeterminate sentence. Inmates who are *statutorily* eligible for the substance abuse program are serving determinate sentences. Therefore, Swinson is not similarly situated to that group. Moreover, Swinson is eligible for discretionary parole, whereas inmates serving determinate sentences are not. That distinction constitutes a rational basis for treating the two groups of inmates differently. Swinson is similarly situated to other persons serving indeterminate sentences. That group’s eligibility to participate in the substance abuse program under WIS. STAT. § 302.05 is governed by WIS. ADMIN. CODE § DOC 302.39(3)(a). No equal protection violation exists.

Lastly, Swinson contends that the denial of discretionary parole is the result of the parole commission’s animus against him because of his belief that he is entitled to release under WIS. STAT. § 302.05. Nothing in the record supports that claim.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals