



OFFICE OF THE CLERK
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

March 29, 2018

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
210 W. Center St.
Juneau, WI 53039

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Dean J. Wingers 450268
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

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

2017AP388-CR

State of Wisconsin v. Dean J. Wingers (L.C. # 2007CF112)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dean J. Wingers appeals, pro se, the order denying his petitions for positive adjustment time. 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 conclude that the petitions were premature, and affirm.

Following a 2007 jury trial, Wingers was convicted of manufacturing methamphetamine, a Class D felony (Count 1); possessing drug paraphernalia to manufacture methamphetamine, a Class H felony (Count 2); and felony bail jumping, a Class H felony (Count 4).² In 2008, the sentencing court imposed fifteen years of initial confinement on Count 1, three years of initial confinement on Count 2, and two years of initial confinement on Count 4. The sentences were ordered to run consecutive to each other.

On January 12, 2017, Wingers filed three separate petitions for positive adjustment time, one for each count. The Department of Corrections issued a preliminary verification that Wingers was eligible for positive adjustment time on Count 1. The department certified that Wingers had been in prison for the entire 671 days between October 1, 2009, and August 2, 2011, and that his term of confinement on Count 1 would be completed on February 4, 2023. In separate letters, the department determined that Wingers was not eligible for positive adjustment time on Counts 2 and 4 because he had not served time on these consecutive sentences between October 1, 2009, and August 2, 2011.

The circuit court denied Wingers' petitions for positive adjustment time on Counts 1 and 2. As grounds, the court checked the box on circuit court form CR-283 indicating that Wingers was not eligible for positive adjustment time because he "did not serve any days in confinement"

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Wingers was convicted of three additional charges. Because he received time-served sentences on those counts, they are not at issue in this appeal.

on either count “between October 1, 2009 and August 2, 2011.” The court’s order did not mention Count 4. Wingers appeals.

Pointing out that he was confined during the entire period from October 1, 2009, to August 2, 2011, Wingers argues that the circuit court erroneously determined that he was not eligible to earn positive adjustment time on Count 1. The State agrees that Wingers is eligible to earn positive adjustment time toward his sentence on Count 1 at the rate of one day of positive adjustment time for every 5.7 days served in confinement between October 1, 2009, and August 2, 2011, for a maximum of 118 days. However, the State asks that we affirm the circuit court on a different ground, namely, that the petition was premature.

We agree with the State that Wingers’ petition on Count 1 was premature and, as such, was properly denied. Under WIS. STAT. § 973.198(1), an inmate may petition for positive adjustment time after having “served the confinement portion of his or her sentence less positive adjustment time earned between October 1, 2009, and August 3, 2011.” However, in light of *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶¶4, 8, 16-18, 64, 76-77, 371 Wis. 2d 127, 883 N.W.2d 86, and as acknowledged in the State’s brief, an inmate may properly petition for sentence adjustment 90 days before the time specified in § 973.198(1).³ In other words, an

³ On October 1, 2009, the early release provisions of 2009 Wis. Act 28 took effect. By its express terms, these provisions retroactively applied to people sentenced on or after December 31, 1999. See 2009 Wis. Act 28, §§ 2722, 9311, 9411. Inmates sentenced on or after December 31, 1999, could begin earning positive adjustment time starting October 1, 2009. *Id.* The early release provisions were repealed by 2011 Wis. Act 38, § 38. Act 38 also created WIS. STAT. § 973.198, which preserved positive adjustment time earned between October 1, 2009, and August 2, 2011, and established a new inmate petition procedure. 2011 Wis. Act 38, § 96. Whereas the pre-repeal law permitted inmates to seek release 90 days before they were eligible, § 973.198(1) appeared to require inmates to file their petitions on the day they first became eligible. In *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶¶4, 8, 62-64, 371 Wis. 2d 127, 883 N.W.2d 86, *aff’g in part and rev’g in part* 2014 WI App 43, 353 Wis. 2d 520, 846

(continued)

inmate may petition for positive adjustment time no earlier than 90 days before he or she has served the confinement portion of his or her sentence less any earned positive adjustment time.

For Wingers, the confinement portion of his sentence on Count 1 will end on February 4, 2023. Even assuming he earned the maximum positive adjustment time of 118 days, Wingers could not be released before October 9, 2022. Clearly, the petition for positive adjustment time filed on January 12, 2017, was many years premature. This is a proper basis for denying relief. See *State v. Copeland*, 2011 WI App 28, ¶20, 332 Wis. 2d 283, 798 N.W.2d 250 (“[W]e may affirm a circuit court if it reaches a proper result for the wrong reason”). We note that nothing prevents Wingers from writing and filing a timely petition for positive adjustment time. Once Wingers’ eligibility is verified, the circuit court will have broad discretion in deciding whether to grant or deny the petition. See *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶23-24, 353 Wis. 2d 520, 846 N.W.2d 820, *aff’d in part and rev’d in part on other grounds*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86.

As to the other two petitions, the State would like us to affirm on the ground advocated in the department’s verification letters—that Wingers “has not served any time in prison between October 1, 2009 and August 3, 2011 during this incarceration for this case 07CF112 count 2” or “for this case 07CF112 count 4,” and “therefore, [these petitions appear] inappropriate.” We prefer to affirm on the narrowest ground possible, namely, that if Wingers’ petition as to Count 1 is premature, the petitions are certainly premature as to the consecutive sentences on Counts 2

N.W.2d 820, the court found that this constituted an ex post facto violation by potentially adding 90 days to an inmate’s sentence in comparison with the pre-repeal early release procedures.

and 4 that he has not started serving. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (“An appellate court should decide cases on the narrowest possible grounds.”).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals