



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](http://www.wicourts.gov)

**DISTRICT II**

September 5, 2018

To:

Hon. Richard J. Nuss  
Circuit Court Judge  
Fond du Lac County Courthouse  
160 S. Macy St.  
Fond du Lac, WI 54935

Eric Toney  
District Attorney  
Fond du Lac County  
160 S. Macy St.  
Fond du Lac, WI 54935

Hon. Gary R. Sharpe  
Circuit Court Judge  
160 S. Macy St.  
Fond du Lac, WI 54935

Dennis R. Krueger  
Assistant District Attorney  
160 S. Macy St.  
Fond du Lac, WI 54935-4241

Ramona Geib  
Clerk of Circuit Court  
Fond du Lac County Courthouse  
160 S. Macy St.  
Fond du Lac, WI 54935

Anne Christenson Murphy  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Cedric T. Cannon, #395314  
Kettle Moraine Corr. Inst.  
P.O. Box 282  
Plymouth, WI 53073-0282

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

---

2017AP1652-CR	State of Wisconsin v. Cedric T. Cannon (L.C. #2003CF160)
2017AP2155-CR	State of Wisconsin v. Cedric T. Cannon (L.C. #2002CF212)
2017AP2156-CR	State of Wisconsin v. Cedric T. Cannon (L.C. #2002CF377)
2017AP2157-CR	State of Wisconsin v. Cedric T. Cannon (L.C. #2002CM678)
2017AP2158-CR	State of Wisconsin v. Cedric T. Cannon (L.C. #2009CF202)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**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).**

In these consolidated cases, Cedric T. Cannon appeals from orders of the circuit court denying Cannon's motions for positive adjustment time (PAT).<sup>1</sup> Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. As we conclude that the circuit court correctly determined that Cannon is not entitled to PAT and properly exercised its discretion, we summarily affirm.

In each of Cannon's five cases, he petitioned for PAT under WIS. STAT. § 973.198.<sup>2</sup> WISCONSIN STAT. § 973.198(1) permits a court to adjust the sentence of an inmate serving a

---

<sup>1</sup> Case Nos. 2017AP2155-58-CR were consolidated for the purposes of appeal by order of this court on December 15, 2017. As case No. 2017AP1652-CR involves the same appellant and raised related issues regarding availability of PAT, we also consolidated 2017AP1652-CR with 2017AP2155-58-CR by order on March 9, 2018, and to facilitate consolidation, we also ordered that case No. 2017AP1652-CR be converted from a one-judge appeal to a three-judge appeal. *See* WIS. STAT. § 752.31(3) (2015-16); WIS. STAT. RULE 809.41(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>2</sup> This appeal involves an issue not often addressed by appellate courts as the ability to accrue PAT in prison was a very short-lived program. In June 2009, the Wisconsin legislature passed 2009 Wis. Act 28, which allowed offenders who were convicted of certain types of crimes to earn PAT during a term of initial confinement. *State v. Carroll*, 2012 WI App 83, ¶3, 343 Wis. 2d 509, 819 N.W.2d 343. WISCONSIN STAT. § 302.113(2)(b) (2009-10) provided in relevant part:

An inmate sentenced under [WIS. STAT. §] 973.01 for a misdemeanor or for a Class F to Class I felony that is not a violent offense, as defined in [WIS. STAT. §] 301.048(2)(bm)1., may earn one day of positive adjustment time for every 2 days served that he or she does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties.

(continued)

bifurcated sentence under WIS. STAT. § 973.01 based on the number of positive adjustment days the inmate earned between October 1, 2009, and August 3, 2011. The inmate may “petition the sentencing court to adjust the sentence under this section, based on the number of days of positive adjustment time the inmate claims that he or she has earned” when he or she “has served the confinement portion of his or her sentence less positive adjustment time earned.” Sec. 973.198(1). The sentencing court’s decision to grant PAT is entirely discretionary.<sup>3</sup> Sec. 973.198(5). The circuit court denied Cannon’s request for PAT in all the above referenced cases. Cannon appeals. We address each appeal below.

#### *2017AP2155-CR*

In 2003, Cannon pled no contest to two counts of delivery of cocaine in exchange for the State dismissing multiple counts in other cases. Cannon was sentenced to a total of five years’ initial confinement (IC) and fifteen years’ extended supervision (ES) on both counts to be served consecutively to any other sentence. Cannon was released to ES, but was ultimately revoked and reconfined for two years. In 2017, Cannon filed a petition for PAT on both counts under WIS. STAT. § 973.198(1). The circuit court denied Cannon’s petition, noting that Cannon had “not

---

Two short years later, in 2011, the legislature enacted 2011 Wis. Act 38, which repealed many of the early release provisions enacted in 2009 Wis. Act 28, including PAT. *Carroll*, 343 Wis. 2d 509, ¶4. Thus, after August 2011, inmates were generally unable to earn PAT, but 2011 Wis. Act 38 also created WIS. STAT. § 973.198, “which preserved the opportunity for certain individuals to earn early release based on positive adjustment time earned between October 1, 2009 and August 3, 2011, but altered the procedures for procuring early release.” *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶15, 371 Wis. 2d 127, 883 N.W.2d 86.

<sup>3</sup> “If the court determines that the inmate has earned positive adjustment time, the court may reduce the term of confinement in prison by the amount of time remaining in the term of confinement in prison portion of the sentence, less up to 30 days, and shall lengthen the term of extended supervision so that the total length of the bifurcated sentence originally imposed does not change.” WIS. STAT. § 973.198(5).

served any time in prison between 10-1-09 and 8-3-11 during *this* incarceration for” these counts.

We concur with the circuit court. The judgment of conviction was entered in this case on October 8, 2003, which imposed five years’ IC and fifteen years’ ES. Cannon’s five years of IC were served entirely before October 1, 2009—the beginning of the window for PAT; therefore, Cannon is not eligible for PAT on this sentence.

*2017AP2156-CR*

In 2002, Cannon was charged with one count of misdemeanor theft and two counts of felony bail jumping, all as a repeater. Cannon pled no contest to the count of misdemeanor theft, and the State dismissed the bail jumping counts. The circuit court entered the judgment of conviction on October 8, 2003, imposing one year in prison consecutive to his sentences in other cases. Cannon’s petition for PAT was denied by the circuit court, as he was not serving a bifurcated sentence on this count. WISCONSIN STAT. § 973.198(1) is only applicable to inmates who are “serving a sentence imposed under [WIS. STAT. § 973.01]”—a bifurcated sentence. As this sentence was not bifurcated, the circuit court properly denied Cannon’s petition as he is not eligible for PAT on this count.

*2017AP2157-CR*

Also in 2002, Cannon was charged with misdemeanor counts of battery, disorderly conduct, and obstructing an officer, all as a repeater. Cannon pled no contest to disorderly conduct, and, in exchange, the other counts were dismissed. Again, on October 8, 2003, the court entered a judgment of conviction sentencing Cannon to three years in prison, consecutive to his other sentences. Cannon filed a petition for PAT pursuant to WIS. STAT. § 973.198, as well as a supplemental petition for PAT and a statement in support of his petition for PAT. As in

appeal No. 2017AP2156, the circuit court denied his petition, explaining that Cannon was “not serving a bifurcated sentence on this count.” Based on the same rationale as above, the circuit court correctly determined that Cannon was not entitled to PAT in this case.

*2017AP2158-CR*

In 2009, while on release to ES, Cannon was charged with one count of delivery of cocaine, a Class G felony, as a second and subsequent offense, and possession with intent to deliver a controlled substance in Fond du Lac County case No. 2009CF202. Cannon pled no contest to one count of delivery of cocaine, and the court sentenced Cannon to three years’ IC and one year ES. Cannon filed a petition for PAT in this case, which the circuit court denied as he “ha[d] not yet begun serving this consecutive sentence.” Since Cannon had not begun serving his sentence in this case prior to filing his 2017 petition for PAT, it would be impossible for Cannon to serve time on this charge during the statutory window from October 1, 2009, to August 3, 2011. The circuit court properly denied Cannon’s petition for PAT in this case.

*2017AP1652-CR*

In 2003, the State charged Cannon with one count of misdemeanor obstructing an officer, two counts of felony bail jumping, and one count of misdemeanor bail jumping in Fond du Lac County case No. 2003CF160 for failing to comply with police instructions during a stop and frisk. After the State amended the felony bail jumping charges to misdemeanors, Cannon pled no contest to all charges. The court sentenced Cannon to six-month sentences in the county jail on each count, to be served consecutively to each other and all other sentences. Accordingly, under WIS. STAT. § 973.03(2), Cannon was required to serve all his sentences, including the jail sentences in this case, in prison.

In June 2017, Cannon filed petitions for PAT for Counts 2, 3, and 4<sup>4</sup> under WIS. STAT. § 973.198, claiming that he was entitled to PAT earned from March 30, 2010, to August 2, 2011. The Department of Corrections (DOC) responded to Cannon’s petitions in a letter to the circuit court explaining that Cannon “is not serving a sentence under WIS. STAT. § 973.01 in this case. He is serving an indeterminate sentence under WIS. STAT. § 973.013; therefore, this petition appears inappropriate.” The circuit court denied Cannon’s petitions based on its agreement with the DOC that Cannon was serving three misdemeanor jail sentences and was “[h]ence not eligible for any sentence adjustment.”

In response, Cannon filed a motion for an order granting his petition for PAT. Cannon argues that he is entitled to PAT on his three misdemeanor sentences; however, Cannon and the State agree that Cannon was not sentenced to a bifurcated sentence under WIS. STAT. § 973.01. Cannon argues that *State v. Harris*, 2011 WI App 130, 337 Wis. 2d 222, 805 N.W.2d 386, supports the proposition that his misdemeanor jail sentences in case No. 2003CF160 were continuous with his felony sentences and, therefore, all under the purview of § 973.01. In *Harris*, the defendant was serving time both in prison and the house of corrections. *Harris*, 337 Wis. 2d 222, ¶1. He argued that he was entitled to “good time” credit for his house of correction sentence despite the fact that he was serving the time in prison under WIS. STAT. § 973.03(2) (2009-10). *Harris*, 337 Wis. 2d 222, ¶1.

The court held that “Harris’s sentences must be considered together. WISCONSIN STAT. § 302.113(4) requires all consecutive sentences imposed for crimes committed after

---

<sup>4</sup> Cannon listed “Resisting/Obstructing Officer” as the crime he was sentenced for on each petition, despite the fact that Counts 2, 3, and 4 were the bail jumping charges.

December 31, 1999, to be computed as one continuous sentence.”<sup>5</sup> *Harris*, 337 Wis. 2d 222, ¶9. The court continued that since the sentences are to be construed as one continuous sentence, it “puts them squarely under the purview of WIS. STAT. § 973.01.” *Harris*, 337 Wis. 2d 222, ¶9. The court determined that he was unable to earn any credit on his sentence either for “good time,” as he was not an inmate of the county jail, or under WIS. STAT. § 302.113 (2009-10), as he had committed a violent offense. *Harris*, 337 Wis. 2d 222, ¶10. Although the issue in *Harris* was eligibility for good time credit, the inference we draw from Cannon’s undeveloped argument is that if an inmate is serving a jail sentence and a prison sentence in prison by virtue of WIS. STAT. § 973.03(2), the inmate should be entitled to PAT under § 302.113 (2009-10) if he or she had not committed a violent offense because all the sentences would fall under the purview of WIS. STAT. § 973.01.

We disagree that the court’s conclusion in *Harris* assists Cannon. *Harris* “requires all consecutive sentences ... to be computed as one continuous sentence.” *Harris*, 337 Wis. 2d 222, ¶9. *Harris* was ineligible for good time credit on a portion of his sentence; thus, the court found that he was ineligible on the entire continuous sentence. As detailed above, Cannon was ineligible for PAT on both his 2003 felony convictions in appeal Nos. 2017AP2155-CR and 2017AP2158-CR because he did not serve any of these sentences during the PAT eligibility window. As Cannon was ineligible for PAT on these underlying sentences, the ineligibility for PAT on one portion of his sentence extends to any piggybacking consecutive sentences, making him ineligible on the entire continuous sentence. *See Harris*, 337 Wis. 2d 222, ¶¶8-9.

---

<sup>5</sup> Our supreme court in *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶52, 300 Wis. 2d 381, 732 N.W.2d 1, similarly held that “the consecutive indeterminate and determinate sentences were properly treated as one continuous sentence.”

Even if Cannon is eligible for PAT by virtue of our decision in *Harris*, however, the decision to ultimately grant PAT is within the broad discretion of the circuit court.<sup>6</sup> *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶23-24, 353 Wis. 2d 520, 846 N.W.2d 820, *rev'd in part on other grounds*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86; *see also* WIS. STAT. § 973.198(3), (5) (noting that the court “shall either deny the petition or hold a hearing” and “*may* reduce the term of confinement in prison” (emphasis added)). We will not reverse a circuit court’s discretionary decision unless the court erroneously exercised its discretion. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. We look for reasons to uphold a circuit court’s exercise of discretion. *Id.*

In denying Cannon’s motion on the merits, the circuit court maintained that the “sentence imposed reflected a fair and thorough analysis of the sentencing factors as confirmed by the record and, further, that any adjustment would unduly depreciate the seriousness of the offense.” This conclusion is supported by the record, and it is one that a reasonable judge could reach. Cannon is a habitual criminal as demonstrated by his multiple convictions and significant prison sentences. His actions in these numerous cases, a substantial criminal history that is only partially represented in this appeal, demonstrate that even while out on extended supervision he

---

<sup>6</sup> The State also notes that “[e]ven if Cannon could show that he was eligible for PAT on any on his sentences, his petitions for PAT are premature.” The State explains that under Cannon’s theory, he is entitled to 805 days of PAT; thus, under WIS. STAT. § 973.198(1), the earliest he may file a PAT petition is sometime in early 2020—805 days before his release date of May 7, 2022. As we conclude that Cannon is not entitled to PAT on any of his sentences in the above referenced cases, we do not address this issue further.



was unable to conform his conduct within the confines of the law. The circuit court did not erroneously exercise its discretion in denying Cannon's request for PAT.<sup>7</sup>

IT IS ORDERED that the orders of the circuit court are 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*

---

<sup>7</sup> Cannon also argues that his due process rights were violated. We disagree. Cannon has no protected liberty interest in early release from prison due to PAT as the circuit court's decision to grant PAT is and has always been purely discretionary under the statute. *See* WIS. STAT. § 973.198 (3), (5); WIS. STAT. § 302.113(2)(c) (2009-10).

Cannon also argues that the changes to PAT violate the Ex Post Facto Clauses of the United States and Wisconsin Constitutions. Cannon argues that he served "a longer time in prison" on his cases than he would have under 2009 Wis. Act 28, "making his punishment more burdensome than it was when committed" which is "prohibited as an Ex Post Facto Law." Cannon's argument is a nonstarter. The 2009 Wis. Act 28 amendments providing inmates the opportunity to earn PAT were passed in 2009—six years after Cannon was sentenced in 2003 for delivery of cocaine—and while the repeal of the statute no longer allowed inmates to work toward reducing their sentence, it did not alter Cannon's sentence as it was initially imposed in 2003. To the extent we have not addressed an argument raised by Cannon on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).