



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 III

February 12, 2019

To:

Hon. James R. Habeck
Circuit Court Judge
Shawano County Courthouse
311 N. Main St.
Shawano, WI 54166

Sue Krueger
Clerk of Circuit Court
Shawano County Courthouse
311 N. Main St.
Shawano, WI 54166

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

Gregory A. Parker
District Attorney
311 N. Main St.
Shawano, WI 54166-2145

William J. Stimac 172834
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2018AP32-CR

State of Wisconsin v. William J. Stimac (L. C. No. 2010CF201)

Before Stark, P.J., Hruz and Seidl, 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).

William Stimac, pro se, appeals an order denying his motion for positive adjustment time (PAT). The issue before us is whether the Department of Corrections' (DOC) interpretation of

WIS. STAT. §§ 302.113(2) and 304.06(1)(bg)1. (2009-10),¹ violates the ex post facto clauses of the Wisconsin and United States Constitutions. Based upon our review of the briefs and record, we have determined at conference that this case is appropriate for summary disposition. We conclude Stimac has not met his burden to show, beyond a reasonable doubt, that the statutes at issue—as interpreted by the DOC—are unconstitutional. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).²

On September 14, 2010, the State charged Stimac with sixth-offense operating a motor vehicle while intoxicated (OWI),³ and other offenses not relevant to this appeal. A jury ultimately found Stimac guilty of the OWI charge, and the circuit court imposed a sentence consisting of three years' initial confinement and three years' extended supervision.

Stimac successfully completed the earned release program while serving his initial term of confinement. Consequently, he was released from prison to extended supervision in May 2013, after serving 360 days of initial incarceration. In June 2014, his extended supervision was revoked and he was reincarcerated for 270 days until March 2015, when he was again released to

¹ These statutes related to the administration of positive adjustment time (PAT), which was a means by which certain inmates were able to earn early release from prison to extended supervision. *See State ex rel. Singh v. Kemper*, 2016 WI 67, ¶19, 371 Wis. 2d 127, 883 N.W.2d 86. PAT was adopted by our state legislature in 2009 Wis. Act 28, and subsequently repealed two years later by 2011 Wis. Act 38. *See Singh*, 371 Wis. 2d 127, ¶2. In *Singh*, our supreme court held that a prisoner, like Stimac, who committed his or her offense while the PAT statutes were in effect remains eligible to earn PAT, which is the reason we consider the 2009-10 version of the PAT statutes in this case. *See Singh*, 371 Wis. 2d 127, ¶¶47-48.

² All future references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

extended supervision. His extended supervision was revoked a second time in October 2016, and he was reconfined for the remainder of his sentence—three years, one month and five days.

In May 2017, Stimac moved the circuit court for a PAT sentence adjustment based on our supreme court’s decision in *State ex rel. Singh v. Kemper*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86.⁴ The circuit court denied the motion, concluding that Stimac was seeking to “claim credit for time served when he was not incarcerated.” However, the court also stated that Stimac “should pursue getting a decision” from the DOC regarding his PAT eligibility.

Stimac did so, and the DOC determined Stimac was, in fact, eligible for PAT. In addition, the DOC calculated that Stimac had served 190 days of confinement on his sentence. In correspondence to the circuit court, Stimac disputed this calculation and stated he had served 1416 days of confinement on his sentence. Consequently, the court requested that the DOC explain the “major difference” between the two calculations.

The DOC responded that its calculation was based only on Stimac’s current period of confinement—i.e., the period of confinement that began when Stimac’s extended supervision was revoked a second time. In contrast, Stimac’s calculation aggregated “all previous terms of

³ At the time, sixth-offense OWI was a class H felony. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)(4m) (2009-10). Based on this felony classification, Stimac is eligible to earn “one day of [PAT] for every 2 days served [in confinement] that he ... does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties.” WIS. STAT. § 302.113(2)(b) (2009-10).

⁴ The *Singh* court also held that the statutory mechanism by which 2011 Wis. Act 38 allowed inmates to petition for a PAT-based sentence adjustment, *see* WIS. STAT. § 973.198, was unconstitutional because it delayed the time at which an inmate could petition for PAT under 2009 Wis. Act 28. *See Singh*, 371 Wis. 2d 127, ¶1 n.1. Based on this holding, the parties here agree an inmate becomes eligible to petition the circuit court for a PAT-based sentence adjustment ninety days prior to the inmate’s anticipated PAT-adjusted release date. *See id.*, ¶17; *see also* WIS. STAT. § 304.06(1)(bk) (2009-10).

confinement served under this sentence”—i.e., his initial confinement period plus the two reconfinement periods served pursuant to the revocations of his extended supervision. The DOC stated its decision to consider only the current period of confinement was based upon “the plain reading of the [relevant] statutory language.” In support, the DOC first pointed to WIS. STAT. § 302.113(2)(a) (2009-10), which provided “an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed[.]” Second, the DOC relied on WIS. STAT. § 304.06(1)(bg) (2009-10), which stated “[t]he person may petition the earned release review commission for release to extended supervision when he or state has served the term of confinement in prison portion of his or her bifurcated sentence[.]”

In December 2017, Stimac again petitioned the circuit court for PAT. In a written decision, the court denied the petition. The court concluded that inmates were only eligible for PAT if their current period of imprisonment included time served while the PAT statutes were in effect.

On appeal, Stimac argues the circuit court erred by denying his December 2017 PAT petition. The State concedes that the circuit court’s basis for denying Stimac’s December 2017 petition for PAT was incorrect, as the dates of Stimac’s current period of incarceration do not determine his PAT eligibility. Rather, the State acknowledges that Stimac is eligible to earn PAT, but nevertheless argues Stimac prematurely filed his December 2017 petition. Therefore, we consider whether the order denying Stimac’s petition for PAT can be affirmed on different grounds than those relied upon by the circuit court. See *State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

The State notes, and we agree, that whether Stimac’s petition was premature hinges on the DOC’s interpretation of the relevant PAT statutes: if all three periods of his incarceration are used to calculate Stimac’s earned PAT, he could have filed his petition as early as October 21, 2017.⁵ However, if, as the DOC concluded, only Stimac’s current period of confinement is used to calculate his earned PAT, he did not become eligible file his petition until September 11, 2018, nearly nine months after he did so.⁶

We observe that, based on the State’s concessions, the parties agree on two major issues: (1) Stimac is eligible to earn PAT at a rate of one day of PAT for every two days spent in confinement; and (2) Stimac may petition for a PAT-based sentence adjustment ninety days prior to his anticipated PAT-adjusted release date. Thus, properly framed, the sole dispute is whether “term of confinement,” as that phrase is used in WIS. STAT. §§ 302.112(2)(a) and 304.06(1)(bg)(1) (2009-10), refers to the aggregate of all periods of confinement served on a given sentence or simply a current period of confinement.

Stimac argues that the DOC’s interpretation of WIS. STAT. §§ 302.113(2)(a) and 304.06(1)(bg)1. (2009-10)—which, again, concludes that only a current period of confinement is used to calculate earned PAT—amounts to an ex post facto law. An ex post facto law is one

⁵ This date reflects that when he filed his December 13, 2017 petition Stimac had been confined for a total of 1043 days during his three periods of confinement. Thus, he would be entitled to 522 days of PAT and eligible to petition for a PAT-based sentence adjustment 612 days before his July 5, 2019 release date—i.e., October 21, 2017.

⁶ This date reflects that when he filed his December 13, 2017 petition Stimac had been confined for 414 days during his current period of reconfinement, entitling him to 207 days of PAT. He would therefore be eligible to petition for a PAT-based sentence adjustment 297 days before his July 5, 2019 release date—i.e., September 11, 2018. Based on the State’s concession, it would appear that there is no dispute that Stimac is currently eligible to petition the circuit court for a PAT-adjusted release date, although there is no indication in the appellate record he has done so.

that: (1) punishes an act that, when committed, was not a crime; (2) increases the punishment for a crime after its commission; or (3) deprives a defendant of a defense to a crime that was available when the crime was committed. *Singh*, 371 Wis. 2d 127, ¶28. Although not entirely clear, it appears that Stimac contends the DOC's statutory interpretation amounts to an ex post facto law because it was promulgated after the statutory authority for PAT was revoked in 2011 and after *Singh*, and therefore impermissibly increases the punishment for his crime after it was committed.⁷

Whether a statute is an ex post facto law is a question of law that we review de novo. *Id.*, ¶26. There is a strong presumption that legislation is constitutional. *Id.* Therefore, Stimac has the burden of establishing beyond a reasonable doubt that the challenged legislation is unconstitutional. *See id.*

Here, Stimac has not shown beyond a reasonable doubt that WIS. STAT. §§ 302.113(2)(a) and 304.06(1)(bg)1. (2009-10), as interpreted by the DOC, are unconstitutional as effecting an ex post facto violation. In fact, Stimac does not analyze the language of these statutes at all. Accordingly, he fails to explain how the DOC's interpretation of these statutes is incorrect or otherwise inconsistent with *Singh*. Although we may grant some leniency to pro se litigants, we will not abandon our neutrality and develop arguments for them. *See Industrial Risk Insurers v.*

⁷ Presumably, Stimac also means to argue that because he was eligible to earn PAT during his first two periods of confinement, but under the DOC's interpretation of the relevant statutes cannot now receive credit for that PAT, an ex post facto violation has occurred. However, there is no indication in the record that Stimac ever attempted to petition for PAT during his first two periods of confinements. Thus, any failure to receive credit for PAT earned during those periods of confinement is attributable to Stimac's failure to attempt to redeem his earned PAT, not to a change in DOC policy, and thus not an ex post facto violation.

American Eng'g Testing, Inc., 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82; *see also Waushara Cty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals