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March 20, 2019

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

2018AP269

State of Wisconsin v. Danny Conner (L.C. # 1996CF960719)

Before Kessler, P.J., Brennan and Brash, 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).

Danny Conner, *pro se*, appeals from an order of the circuit court that denied his petition for release to extended supervision. 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 (2017-18).¹ The order is summarily affirmed.

BACKGROUND

In January 1996, Conner solicited someone to kill a man who Conner erroneously believed was an undercover police officer. In May 1996, a jury convicted Conner of first-degree intentional homicide as a party to a crime. In July 1996, the circuit court sentenced Conner to life imprisonment and set his parole eligibility date as July 16, 2061, sixty-five years from the date of sentencing.² *See* WIS. STAT. § 973.014(1)(b) (1995-96). This court affirmed Conner’s conviction on direct appeal in 1998. We also affirmed a circuit court order denying a WIS. STAT. § 974.06 motion in 2001.

In December 2017, Conner petitioned for release to extended supervision pursuant to WIS. STAT. § 302.114(1)-(2), which allows some offenders serving a life sentence to petition for release to extended supervision, or WIS. STAT. § 304.02(1), which establishes the special action parole release program. Conner asserted he should be entitled to petition for release to extended supervision because the sentencing court did not indicate which subsection of WIS. STAT. § 973.014 it used when sentencing him, and both the judgment of conviction and sentencing transcript are silent on whether “the sentencing judge did or did not intend that the defendant can or cannot have the consideration of being eligible to petition the Court after he has served 20 years to be released to extended supervision.” The circuit court denied the motion, noting that

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² Sentenced was imposed by the Honorable Patricia D. McMahon.

extended supervision did not apply to Conner because he was sentenced before it was created.³
Conner appeals.

DISCUSSION

Statutory interpretation is a question of law that we review *de novo*. See *State v. Stewart*, 2018 WI App 41, ¶18, 383 Wis.2d 546, 916 N.W.2d 188. Ordinarily, “an inmate will be convicted and sentenced under the law that was in effect at the time the offense was committed.” See *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶36, 371 Wis. 2d 127, 883 N.W.2d 86.

The law in effect at the time Conner committed his offense and was sentenced was WIS. STAT. § 973.014 (1995-96), which provided:

(1) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, the court shall make a parole eligibility determination regarding the person and choose one of the following options:

(a) The person is eligible for parole under s. 304.06 (1).

(b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06 (1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (1).

(c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995.

(2) When a court sentences a person to life imprisonment under s. 939.62 (2m), the court shall provide that the sentence is without the possibility of parole.

³ The motion was denied by the Honorable Mark A. Sanders.

As it relates to this case, WIS. STAT. § 304.06(1)(b) (1995-96) provided, in part, that “[e]xcept as provided in [WIS. STAT. §§] 939.62(2m) or 973.014, the parole commission may parole an inmate serving a life term when he or she has served 20 years[.]” As referenced in § 973.014(2) (1995-96), § 939.62(2m) (1995-96) is the penalty enhancer statute for habitual criminality. While Conner asserts the record is silent about which subsection of § 973.014 the sentencing court relied upon, we know that he was sentenced under § 973.014(1) because he was not charged with nor convicted of being a habitual criminal. Further, because the sentencing court specified a parole eligibility date, we also know that Conner was sentenced under § 973.014(1)(b), regardless of whether the judgment of conviction so stated.

Release to Extended Supervision under WIS. STAT. § 302.114

Conner’s first basis for his petition for release is WIS. STAT. § 302.114(2), which allows some inmates serving life sentences to “petition the sentencing court for release to extended supervision after he or she has served 20 years[.]” By the statute’s express terms, though, § 302.114 applies only to inmates “serving a life sentence imposed under [WIS. STAT. §] 973.014(1g)(a)1. or 2.” *See* § 302.114(1). As noted above, Conner was sentenced under § 973.014(1)(b), not § 973.014(1g). In fact, he never could have been sentenced under § 973.014(1g) because it was not created until 1998. *See* 1997 Wis. Act 283, § 426.

Additionally, WIS. STAT. § 973.014(1g) on its face does not apply to Conner: it applies only “when a court sentences a person to life imprisonment for a crime committed on or after

December 31, 1999[.]”⁴ Thus, WIS. STAT. § 302.114 does not authorize Conner to petition for release to extended supervision.

Moreover, “extended supervision” was not a part of sentence structures until Wisconsin shifted to a “truth-in-sentencing” scheme, which went into effect on December 31, 1999. *See State v. Trujillo*, 2005 WI 45, ¶¶3-4, 279 Wis. 2d 712, 694 N.W.2d 933, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶3-4, 333 Wis. 2d 53, 797 N.W.2d 828; *see also* 1997 Wis. Act 283, § 419. Offenders serving a bifurcated sentence under truth-in-sentencing are not eligible for release on parole. *See Trujillo*, 279 Wis. 2d 712, ¶3. Because Conner was not sentenced under the truth-in-sentencing rules, the circuit court correctly concluded that “extended supervision” is not available to him.

Special Action Parole Release under WIS. STAT. § 304.02

Conner’s second ground for seeking release is “special action parole release” under WIS. STAT. § 304.02(1). Among other things, this program requires the Department of Corrections to develop criteria by which the secretary of the Department decides whether to grant a petition for release to reduce prison overcrowding. *See* § 304.02(2). The circuit court does not have release power conferred upon it under this statute and, thus, cannot grant such a petition for release.

But Conner also does not appear to meet the objective statutory criteria for the program. For one thing, he is incarcerated on a felony conviction for an assaultive crime, making him

⁴ When WIS. STAT. § 973.014(1g) was created, the introductory language of § 973.014(1) was amended to specify that it applies to crimes committed on or after July 1, 1988, but before December 31, 1999. *See* 1997 Wis. Act 183 § 484. This was not a substantive change to the statute but merely a useful codification of the effective dates of the statute’s various parts.

ineligible. *See* WIS. STAT. § 304.02(3)(b). Also, § 304.02(3)(e) requires the inmate to be “eligible for release under [WIS. STAT. §] 304.06(1)(b),” but Conner is not so eligible because the sentencing court selected his eligibility date. *See* WIS. STAT. § 973.014(1)(a)-(b) (1995-96); *see also supra* at 3-4. Conner is not entitled to special action parole release.

Ex Post Facto Violation

Conner also claims an ex post facto violation. “[A]ny statute that makes the punishment for a crime more burdensome after it is committed is prohibited as an ex post facto law.” *Singh*, 371 Wis. 2d 127, ¶28. Whether a statute is an ex post facto law is a question of law we review *de novo*. *See State v. Scruggs*, 2015 WI App 88, ¶6, 365 Wis. 2d 568, 827 N.W.2d 146.

Prior to 1988, the Department of Corrections could parole an inmate serving a life term after he or she had served a minimum of twenty years of the sentence. *See* WIS. STAT. § 57.06(1) (1985-86).⁵ In 1988, the legislature created WIS. STAT. § 973.014, which required a sentencing court imposing a life sentence to make a parole eligibility determination by specifying that the person was eligible for parole either (1) under WIS. STAT. § 57.06(1) (1987-88) or (2) on a specific date set by the sentencing court. *See* 1987 Wis. Act 412, § 5. Section 973.014 took effect on July 1, 1988, well before Conner’s 1996 sentencing. *See* 1987 Wis. Act 415, § 7.

Conner’s ex post facto claim appears to be that because WIS. STAT. § 57.06 (1987-88) was not repealed upon the creation of WIS. STAT. § 973.014, the sentencing court could not

⁵ WISCONSIN STAT. § 57.06 was later renumbered as WIS. STAT. § 304.06, which is its current iteration. *See* 1989 Wis. Act 31, § 1699.

ignore the § 57.06(1)(b)⁶ “requirement” that an inmate serving a life sentence be eligible for parole after twenty years. But at the same time that § 973.014 was created, § 57.06(1)(b) was amended to include a caveat: “Except as provided in § 973.014.” *See* 1987 Wis. Act 412, § 3. Thus, after 1987 Wis. Act 412, the combined effect of §§ 57.06 and 973.014 was that when Conner was sentenced to life in prison, the sentencing court had the discretion to either allow him to be eligible for parole after the default minimum of twenty years, as set out in § 57.06, or set a later eligibility date; Conner’s sentencing court opted for the latter. Even if the enactment of § 973.014 did somehow make the punishment for Conner’s offense more burdensome, the statute was enacted *before* Conner committed his offense, so there is no ex post facto violation.⁷

The Interest of Justice

Finally, Conner asks that we reverse his sentence in the interest of justice. He claims that the sentencing court failed to articulate any reasons for its sentence on the record and that a sixty-five-year wait for parole eligibility is unduly harsh and unconstitutional.

Despite two prior attempts at postconviction relief, Conner did not previously raise these sentencing challenges. We are not entirely convinced he is entitled to raise them now. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *see also State v. Walker*, 2006 WI 82, ¶31, 292 Wis. 2d 326, 716 N.W.2d 498. In any event, our discretionary

⁶ Prior to the enactment of WIS. STAT. § 973.014, WIS. STAT. § 57.06(1) was renumbered as § 57.06(1)(b). *See* 1987 Wis. Act 244, § 1.

⁷ To the extent that Conner has made other claims of error in his motion for release or his appellant’s brief, including claims premised on the administrative code, we reject them as lacking in sufficient clarity or merit to warrant further discussion. *See Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

authority under WIS. STAT. § 752.35 is to be used sparingly, only in extreme cases. *See State v. Kucharski*, 2015 WI 64, ¶23, 363 Wis. 2d 658, 866 N.W.2d 697; *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We are not persuaded to use that power here. The sentencing transcript reflects a proper exercise of the sentencing court's discretion, *see State v. Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197, and Conner does not persuade us that his sentence was unduly harsh in light of his crime.

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed. *See* 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