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DISTRICT IV

November 6, 2019

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

2019AP340

State of Wisconsin ex rel. Dontae L. Doyle v. Daniel Gabler and
Brad Schimel (L.C. # 2018CV1704)

Before Kloppenburg, Graham, and Nashold, 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).

Dontae Doyle, pro se, appeals the circuit court's order denying his petition for a writ of certiorari review of a parole commission decision that denied him parole. 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(1).¹ We affirm.

Doyle states that he is “not challenging the denial of parole nor ... seeking review of that decision.” Rather, he challenges the commission’s application of a statutory provision, WIS. STAT. § 304.06(1m), that allows early eligibility for parole based on “extraordinary circumstances.” *See* § 304.06(1m)(a). He seeks a new parole hearing at which the commission would determine whether there are extraordinary circumstances.

The statute provides that the commission may waive the requirement that an inmate is not eligible for parole prior to serving 25% of a sentence if the commission “determines that extraordinary circumstances warrant an early release” and certain other conditions are met. *See* WIS. STAT. § 304.06(1m)(a). In *State ex rel. Szymanski v. Gamble*, 2001 WI App 118, 244 Wis. 2d 272, 630 N.W.2d 570, this court interpreted the statute as setting forth two decision-making levels: “(1) whether the minimum service requirement should be waived, and, if so, (2) whether the inmate should be granted parole.” *Id.*, ¶12. Thus, a determination of extraordinary circumstances does not guarantee a grant of parole. *See id.*, ¶11.

The respondent commission chairperson argues that Doyle’s appeal is moot. The chairperson points out that Doyle had already served more than 25% of his sentence, that Doyle received a parole hearing, and that Doyle, by his own admission, does not challenge the outcome of that hearing. The chairperson argues that a determination that there are extraordinary circumstances would not entitle Doyle to anything more than he has already received. A case is

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

moot when a ruling in favor of the appellant would afford the appellant no more parole relief than the appellant has already received. *See State ex rel. Renner v. DHSS*, 71 Wis. 2d 112, 116-17, 237 N.W.2d 699 (1976).

We question whether mootness is the proper lens through which to view this case. It may be more accurate to say that the waiver provision in WIS. STAT. § 304.06(1m)(a) simply does not apply to an inmate such as Doyle who has already served more than 25% of his sentence. When, as here, this minimum service requirement has already been met, there is no apparent point to seeking a waiver.

Having said that, we need not definitively resolve the question of WIS. STAT. § 304.06(1m)(a)'s applicability to Doyle. Instead, for two reasons, we resolve this case based on mootness. First, whether or not § 304.06(1m)(a) applies, we agree with the commission chairperson that a determination of extraordinary circumstances under § 304.06(1m)(a) would not entitle Doyle to anything more than he has already received. Second, Doyle has not filed a reply brief or otherwise disputed the chairperson's mootness argument. Thus, we take Doyle to have conceded that argument. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). We note that under either theory—i.e., that § 304.06(1m)(a) is inapplicable to Doyle or that this case is moot—the result is the same.

Therefore,

IT IS ORDERED that the circuit court's 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