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October 15, 2020

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

2019AP1844 State of Wisconsin ex rel. Daniel Anderson v. Cathy Jess (L.C. # 2018CV887)

Before Blanchard, 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).

Daniel Anderson appeals a circuit court order that dismissed Anderson's petition for certiorari review of a custody classification decision by the Department of Corrections (DOC). 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] We summarily affirm.

Anderson petitioned the circuit court for a writ of certiorari to review DOC's decision to maintain Anderson's medium security classification. The circuit court issued the writ, and DOC filed the certified return with the circuit court. Respondent Cathy Jess, Administrator of the DOC Division of Adult Institutions, moved to dismiss the petition as untimely. Anderson opposed the motion, arguing that his petition was timely filed. The circuit court dismissed Anderson's petition as untimely.

Anderson contends that the circuit court erred by dismissing his petition as untimely. Jess responds that the circuit court properly dismissed the petition as untimely and that, alternatively, this court should affirm on the merits because DOC properly decided Anderson's security classification. We assume, without deciding, that Anderson's petition was timely filed under WIS. STAT. § 893.735(2).[2] We conclude that Anderson's petition fails on the merits. We affirm the circuit court on that basis. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (where the circuit court's decision is correct, we may affirm on grounds not utilized by that court).[3]

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

[2] Because we reach the merits of Anderson's petition, we do not address the various arguments Anderson makes related to the circuit court's decision to dismiss the petition as untimely. Those arguments include Anderson's assertions that the circuit court staff attorney lacked authority to reject Anderson's filings as untimely and that the respondent knowingly misrepresented facts as to when Anderson received DOC's decision.

[3] Counsel for the respondent cites an unpublished per curiam opinion of this court for the proposition that this court may affirm on grounds other than those relied on by the circuit court. Although (continued)

On certiorari review, we review the decision of DOC, not the decision of the circuit court, and the scope of our review is identical to the circuit court's. *See* ***State ex rel. Saenz v. Husz***, 198 Wis. 2d 72, 76-77, 542 N.W.2d 462 (Ct. App. 1995). Our review is limited to deciding whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable, and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. ***State ex rel. Purifoy v. Malone***, 2002 WI App 151, ¶13, 256 Wis. 2d 98, 648 N.W.2d 1.

Anderson argued in his petition to the circuit court that DOC erred by relying on Anderson's unmet sex offender treatment needs and nonparticipation in sex offender treatment programming in making its security classification decision. In support, he argued that WIS. STAT. § 301.047(3)(d) prohibits DOC from considering nonparticipation in group programming to deny custody reclassification when an inmate is low risk in all areas. He argued that the DOC rule allowing consideration of unmet treatment needs is contrary to state statute, as prohibited by WIS. STAT. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law."). Anderson also argued that DOC had improperly relied on Anderson's Alabama case, asserting that the case was closed with no open warrants, and that DOC had improperly relied on Anderson's assault conviction that was not charged as a sexual assault. We are not persuaded.

After a review hearing, DOC recommended maintaining Anderson's medium security classification based on its findings that Anderson's current offense of child enticement involved

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an unpublished authored court of appeals opinion released after July 1, 2009, may be cited for persuasive value, a per curiam opinion is not an authored opinion for purposes of the rule. *See* WIS. STAT. RULE 809.23(3)(a)-(b). An unpublished per curiam opinion therefore may not be cited "except to support a claim of claim preclusion, issue preclusion, or the law of the case." *See* ***id.*** We remind counsel that we expect compliance with the rules of appellate procedure.

offense dynamics with female teenagers, that Anderson had an offense history of similar behavior and dynamics, and that Anderson had unmet sex offender treatment needs. Anderson did not argue that DOC's findings were not supported by the evidence or that its decision was not based on appropriate factors in the DOC rules. *See* WIS. ADMIN. CODE § DOC 302.11(1), (5), (12), and (13) (in determining an inmate's custody classification, DOC may consider factors including the nature and seriousness of the offense; the inmate's criminal record; risk to the public; and the inmate's performance in treatment or other programs). Rather, Anderson argued that WIS. STAT. § 301.047(3)(d) prohibits DOC from considering nonparticipation in group programming. Anderson's argument, however, is unavailing. Section 301.047(1) provides that nonprofit community-based organizations may operate inmate rehabilitation programs in DOC facilities if certain criteria are satisfied. Subsection (3)(d) provides that DOC "may not base any decision regarding an inmate's conditions of confinement, including discipline, or an inmate's eligibility for release, on an inmate's decision to participate or not to participate in a rehabilitation program" operated by a non-profit community-based organization. Here, Anderson has not established that DOC considered his decision not to participate in a rehabilitation program operated by a non-profit community-based organization as part of its security classification decision.

Anderson's assertions that his Alabama case was closed and that his prior assault conviction was not a sexual assault are also unavailing. While DOC noted Anderson's Alabama case, it did not list that case as one of the reasons for its decision. Additionally, DOC did not rely on whether Anderson's prior assault conviction was a sexual assault. Rather, DOC explicitly relied on Anderson's current offense and history of similar behavior and his unmet

treatment needs. Because Anderson did not establish that DOC erred by determining his security classification, the circuit court properly dismissed Anderson's petition.

Therefore,

IT IS ORDERED that the order 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