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DISTRICT IV

December 9, 2021

To:

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Circuit Court Judge
Electronic Notice

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

2020AP1407

State of Wisconsin ex rel. Jeremy T. Greene v. Kevin A. Carr
(L.C. # 2020CV991)

Before Blanchard, P.J., Kloppenburg, 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).

Jeremy Greene, an inmate at Waupun Correctional Institution and appearing pro se, appeals a circuit court order that dismissed Greene's petition for a writ of mandamus for failure to state a claim, and the court's order denying reconsideration. Greene contends that he is entitled to a writ of mandamus compelling the Secretary of the Department of Corrections (DOC) and prison officials to ensure that the Wisconsin prisons do not exceed their population limits. Alternatively, Greene contends that his petition should be liberally construed as seeking relief under certiorari or asserting a deprivation of his constitutional right against cruel and

unusual punishment. 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 (2019-20).¹ We summarily affirm.

Greene petitioned the circuit court for a writ of mandamus to compel the respondents to ensure that the prisons do not exceed their population limits. Greene asserted that conditions of prison overcrowding, including double-celling, are harmful to Greene and other prison inmates. The circuit court dismissed the petition on grounds that Greene failed to state a claim. The circuit court explained that the respondents have broad discretion in handling prison overcrowding, and that they therefore did not have a plain legal duty that could be enforced through mandamus. Greene moved for reconsideration, arguing that the court had overlooked a plain duty by the respondents to enforce prison population limits. He argued that, in the alternative, the circuit court should have construed the petition as seeking certiorari review of DOC's failure to adhere to its own rules or asserting constitutional violations under 42 U.S.C. § 1983. The circuit court denied the motion, explaining that Greene had not identified a specific duty that the respondents had failed to perform, and also that Greene's petition, liberally construed, did not state any other claim for relief.

A petition for a supervisory writ of mandamus must establish that: (1) the petitioner has a clear legal right to the relief sought; (2) the duty the petition seeks to enforce is plain; (3) the petitioner will be substantially damaged by nonperformance of the duty; and (4) the petitioner has no adequate remedy at law. *State ex rel. Robins v. Madden*, 2009 WI 46, ¶10, 317 Wis. 2d

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

364, 766 N.W.2d 542. We review a circuit court’s denial of a petition for a writ of mandamus for an erroneous exercise of discretion. *See State ex rel. Zignego v. Wisconsin Elections Comm’n*, 2020 WI App 17, ¶32, 391 Wis. 2d 441, 941 N.W.2d 284. However, whether a petition states a claim for relief is a question of law, which we review de novo. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶9, 252 Wis. 2d 404, 643 N.W.2d 515. On our review, we accept the facts pleaded as true. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). A petition is legally insufficient only if there are no conditions under which the petitioner can prevail. *See State ex rel. Adell v. Smith*, 2001 WI App 168, ¶5, 247 Wis. 2d 260, 633 N.W.2d 231.

Greene argues that the respondents have a mandatory duty to ensure that prisons do not exceed their population limits. In support, Greene cites WIS. STAT. § 301.055, which states that DOC

shall promulgate rules providing limits on the number of prisoners at all state prisons The rules shall provide systemwide limits and limits for each state prison, except the department may provide a single limit for the Wisconsin correctional center system. The rules may provide procedures allowing the department to exceed any systemwide, institution or center system limit in an emergency situation.

Greene argues that the use of the word “shall” imposes a mandatory duty on DOC to ensure that prisons do not exceed the prisoner population limits unless an emergency situation exists. He also argues that the respondents have a duty to protect prisoners from the harms associated with prison overcrowding.

Green also notes that, consistent with WIS. STAT. § 301.055, DOC has promulgated WIS. ADMIN. CODE § DOC 302.05 (Nov. 2021),² which provides that DOC

shall maintain limits on the number of prisoners at each institution and limits on the number of prisoners system-wide under s. 301.055, Stats. The limits may be exceeded in an emergency or disturbance situation. Given the dynamic nature of these potential capacities, department policy shall address requirements regarding the establishment and computation of system wide and each state prison limits and it shall address procedures by which it may exceed system wide and each state prison limits.

Green acknowledges that the manner in which the respondents manage overcrowding at prisons is discretionary, but argues that there is a mandatory duty that they exercise that discretion to ensure that the prisons do not exceed the prison population limits. He argues that the respondents' duty is akin to the mandatory duty recognized in *Swatek v. County of Dane*, 192 Wis.2d 47, 531 N.W.2d 45 (1995), for sheriffs to provide inmates in their custody with appropriate medical care, even though sheriffs have discretion in deciding how best to attend to inmates' medical needs. Greene also cites *State ex rel. Thomas v. State*, 55 Wis. 2d 343, 350, 198 N.W.2d 675 (1972), for the proposition that "mandamus will lie to compel the exercise of ... discretion." *See id.* ("While mandamus will not lie to compel a specific result, the writ will lie to determine whether the discretion was abused or whether the discretion was exercised arbitrarily and capriciously.").

We conclude that Greene has not established that the respondents have failed to comply with a plain duty, such that mandamus would be an available remedy. "An act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through

² All references to the Wisconsin Administrative Code are to the November 2021 register.

mandamus.” *Naseer v. Miller*, 2010 WI App 142, ¶5, 329 Wis. 2d 724, 793 N.W.2d 209. Here, Greene does not dispute that the respondents have discretion as to how to manage overcrowding at prisons. Rather, he argues that the respondents have a mandatory duty to exercise that discretion to ensure prison population limits are not exceeded. However, the only legal duty set forth in WIS. STAT. § 301.055 is that DOC promulgate rules limiting the prison population. As Greene recognizes, the DOC has done so by promulgating WIS. ADMIN. CODE § DOC 302.05. Moreover, § DOC 301.055 states that DOC policy “shall address procedures by which it may exceed system wide and each state prison limits.” Because DOC has complied with its mandatory duty to promulgate rules limiting the prison population, and the manner in which the respondents manage prison overcrowding is discretionary, mandamus is not an appropriate remedy.³ See *Law Enf’t Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981) (mandamus is not an appropriate remedy “when the duty is not clear and unequivocal and requires the exercise of discretion” (quoted source omitted)).

In the alternative, Greene contends that his petition should be liberally construed as stating a claim for relief under certiorari or 42 U.S.C. § 1983. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983) (“We have long adhered to the view that pro se prisoner complaints, whether offered in petition or any other form, including letters to judges,

³ Moreover, Greene has not filed a reply brief disputing the arguments in the State’s brief that Greene has failed to identify a mandatory duty that the respondents have failed to perform. He has therefore conceded that he failed to state a claim for mandamus. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to refute a proposition asserted in a response brief may be taken as a concession).

We also note that Greene’s handwritten brief is not entirely legible. To the extent that any specific arguments in Greene’s brief are not specifically addressed in this opinion, we have concluded that the argument was indecipherable or insufficiently developed. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments).

must be construed liberally to determine if the complaint states any facts giving rise to a cause of action.”). However, even liberally construed, Greene’s assertions do not state any viable cause of action. It appears that Greene’s argument that he has stated a claim for relief under certiorari is that the DOC has failed to follow its own rules for limiting the prison population. *See State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (“[A]n agency is required to follow its own procedural rules, and our certiorari inquiry encompasses the question of whether the agency has done so.”). As set forth above, Greene has not alleged facts that would show that the respondents failed to comply with their own rules regarding prison populations.⁴

Greene has also failed to set forth a claim for relief under 42 U.S.C. § 1983 because he has not alleged conditions that “denied him ‘the minimal civilized measure of life’s necessities.’” *See Gillis v. Litscher*, 468 F.3d 488, 491 (7th Cir. 2006) (quoted source omitted). While this court recognizes the potential harm to prison inmates from prison overcrowding and double-celling as outlined in Greene’s brief, Greene’s allegations do not amount to a constitutional violation. Greene contends that Wisconsin prisons are operating at 132% population capacity, resulting in double-celling. However, overpopulation and double-celling, by themselves, do not amount to cruel and unusual punishment.⁵ *See Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981) (Eighth Amendment not violated even though prison population exceeded design capacity

⁴ We do not address the other criteria for seeking certiorari review.

⁵ We note again that Greene has failed to file a reply brief disputing the State’s argument that Greene alleges only overcrowding and double-celling and falls short of alleging a constitutional violation. Greene has therefore conceded that argument. *See United Coop.*, 304 Wis. 2d 750, ¶39. Additionally, we reiterate that, due to the poor legibility of Greene’s brief, we address only the arguments that we have determined are sufficiently legible and sufficiently developed to warrant discussion. *See Pettit*, 171 Wis. 2d at 646.

by 38%); *French v. Owens*, 777 F.2d 1250, 1252 (7th Cir. 1985) (the mere practice of double celling is not per se unconstitutional).

Therefore,

IT IS ORDERED that the orders 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