

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP3124-CR

Cir. Ct. No. 2008CF38

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. ROCKEFELLER, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County:
DAVID G. MIRON, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. John Rockefeller, Sr., appeals an order denying his petition to modify the conditions of his extended supervision. Because we conclude that Rockefeller's petition was premature, we reverse and, on remand, direct the circuit court to dismiss the petition.

BACKGROUND

¶2 In 2009, Rockefeller was convicted of two counts of failure to pay child support. He was sentenced to a term of initial confinement, followed by a term of extended supervision.

¶3 At sentencing, the circuit court expressed concern that Rockefeller's substance abuse hampered his ability to pay child support. Rockefeller had been using marijuana since age fifteen, had a prescription for medical marijuana in California, and was growing six marijuana plants in his home. The court determined that Rockefeller's marijuana use "really destroy[ed his] ability to want to do anything else." Accordingly, Rockefeller was not allowed to transfer his supervision to California. The court required, as a condition of supervision, that Rockefeller live in Wisconsin and either find full-time employment or verify his efforts to find such employment.

¶4 Shortly before Rockefeller was to be released, the Department of Corrections requested that the circuit court amend Rockefeller's judgment of conviction. The Department informed the court that Rockefeller's father in Minnesota had offered support and job assistance if the court would allow Rockefeller to move there. The State objected, and the court denied the Department's request.¹ Rockefeller was released on July 28, 2010.

¶5 On August 30, 2010, Rockefeller's counsel also wrote to the circuit court requesting to amend Rockefeller's judgment of conviction. Rockefeller's counsel represented that Rockefeller had been unable to find work in Marinette,

¹ The Department has not appealed that determination.

was living in a halfway house, and had family willing to provide housing and job assistance in Minnesota. The State objected the following day, and the circuit court, noting it had “carefully considered the situation ... on numerous occasions[,]” denied Rockefeller’s request. A final order to that effect was entered on November 29.

DISCUSSION

¶6 On appeal, Rockefeller argues the circuit court erroneously exercised its discretion by requiring Rockefeller to remain in Wisconsin. Rockefeller asserts that the condition prohibiting foreign residence was neither reasonable nor appropriate. *See State v. Carrizales*, 191 Wis. 2d 85, 93, 528 N.W.2d 29 (Ct. App. 1995). Accordingly, Rockefeller claims the circuit court erroneously denied his petition to modify that condition.

¶7 We conclude, however, that Rockefeller’s modification petition was premature. WISCONSIN STAT. § 302.113(7m)(e)2.² prohibits modification petitions “within one year after the inmate’s release to extended supervision.” Rockefeller was released to extended supervision on July 28, 2010. His August 30, 2010 petition was therefore premature.

¶8 Rockefeller contends WIS. STAT. § 302.113(7m)(e)2. does not apply. He relies on *State v. Fisher*, 2005 WI App 175, 285 Wis. 2d 433, 702 N.W.2d 56, for the proposition that a supervisee who seeks to abolish—as opposed to modify—a condition of supervision is not bound by the timeliness provisions of

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that statute. There, an inmate raised constitutional challenges to alcohol-related conditions of supervision. *Id.*, ¶6. The State asserted Fisher’s modification petition was premature, citing WIS. STAT. § 302.113(7m)(e)1. (2003-04).³ We concluded that subdivision 1.’s timeliness provision applied only when an inmate seeks to change the conditions of supervision, not abolish them entirely. Rockefeller contends that, like the defendant in Fisher, he seeks to abolish the contested condition, not modify it.

¶9 Rockefeller’s argument elevates form over substance. Although on appeal he claims he is seeking to abolish the residency condition, his petition merely stated the desired result—transfer to Minnesota—and left the circuit court to choose the appropriate mechanism. Rockefeller requested that the court “amend his judgment of conviction to either remove the language prohibiting him from transferring his supervision outright, or to add language specifically allowing him to transfer his supervision to Minnesota.” The gist of this request was to alter the residency condition to allow him to move to a single state: Minnesota.⁴ In other words, Rockefeller sought to make the residency condition “more temperate and less extreme.” See *Fisher*, 285 Wis. 2d 433, ¶10 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1452 (unabridged 1993)). Under *Fisher*, that is an attempt to modify the conditions of his supervision. Rockefeller’s petition is therefore premature.

³ WISCONSIN STAT. § 302.113(7m)(e)1. prohibits an inmate from petitioning to modify conditions of supervision earlier than one year before the inmate’s release date. Thus, subdivision 1. concerns the timeliness of modification petitions filed before the inmate is released, while subdivision 2. concerns the timeliness of those filed after release.

⁴ Indeed, Rockefeller assured the circuit court that he would not return to California. Had the court simply abolished the residency condition, Rockefeller could have sought transfer to that state, even though the residency condition was intended to avoid that very result.

¶10 In any event, *Fisher* found strong support for its interpretation in the legislative history of WIS. STAT. § 302.113(7m)(e)1., but that history that does not support Rockefeller’s position. The Criminal Penalties Study Committee, which recommended adoption of § 302.113(7m)(e)1. and 2., “thought it best to wait until just one year prior to release to assess whether newer options met sentencing objectives better than the offender’s original conditions of supervision.” *Fisher*, 285 Wis. 2d 433, ¶13; *see also* CRIMINAL PENALTIES STUDY COMM., FINAL REP. 131 (1999). Similarly, with respect to modification petitions after release, the Committee recommended legislation that prohibited a supervisee from seeking modification more than once annually. FINAL REP., *supra*, at 131. Ultimately, the legislature imposed a one-year waiting period before a supervisee is allowed to petition for modification, ostensibly to allow sufficient time to assess the effectiveness of the current conditions. *See* WIS. STAT. § 302.113(7m)(e)2. “The legislative rationale of waiting until the court can prudently and timely weigh additional options newly available to the offender does not apply to constitutionally invalid conditions.” *Fisher*, 285 Wis. 2d 433, ¶14. However, it does apply when the conditions are legal and the offender, as here, merely asserts they are ineffective.

¶11 Because Rockefeller’s petition was premature, the circuit court should have dismissed the petition without reaching a decision on its merits. We therefore reverse and, on remand, direct the circuit court to dismiss Rockefeller’s petition. As the one-year waiting period has now passed, Rockefeller may file a new petition if he chooses.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

