COURT OF APPEALS DECISION DATED AND FILED

May 28, 2014

Diane M. Fremgen
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. 2013AP313-CR

Cir. Ct. No. 2008CF4448

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEKSEY RUDERMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Aleksey Ruderman, *pro se*, appeals an order denying his petition for positive adjustment time and for a corresponding reduction in his term of confinement in prison. *See* WIS. STAT. § 973.198

(2011-12).[1] Because we conclude that the trial court properly exercised its discretion when denying Ruderman's petition, we affirm.

¶2 The record shows that Ruderman was driving a car in the early morning hours of August 31, 2008, when he struck and killed a pedestrian. A test of Ruderman's blood revealed an estimated blood alcohol level of .27 at the time of the incident. The State charged him with homicide by intoxicated use of a motor vehicle, but, pursuant to a plea bargain, Ruderman pled guilty to one count of homicide by negligent operation of a motor vehicle, a Class G felony. *See* WIS. STAT. § 940.10(1). In June 2009, the trial court imposed five years of initial confinement and three years of extended supervision.

¶3 In January 2013, Ruderman filed the petition for positive adjustment time that underlies this appeal. Pursuant to WIS. STAT. § 973.198, certain inmates may petition for reductions in their terms of confinement by requesting an award of positive adjustment time earned during the period between October 1, 2009, and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

August 3, 2011, under WIS. STAT. § 302.113 (2009-10) or § 304.06 (2009-10).[2] An inmate convicted of a Class G felony that is not a violent offense as defined in WIS. STAT. § 301.048(2)(bm)1. may earn one day of positive adjustment time for every two days served. *See* WIS. STAT. § 302.113(2)(b). Ruderman is ineligible for positive adjustment time under this statute because a violation of WIS. STAT. § 940.10 is a violent offense as defined in § 301.048(2)(bm)1. Pursuant to WIS. STAT. § 304.06(1)(bg), an inmate convicted of a Class G felony that is a violent offense as defined in § 301.048(2)(bm)1. is eligible to earn one day of positive adjustment time for every three days served unless excluded by application of § 304.06(1)(bg)1.am.-o. Here, the trial court found that Ruderman was eligible for one day of positive adjustment time for every three days served. *See* § 304.06(1)(bg)1. Nonetheless, the trial court rejected his claim for positive

[2] In 2009, the legislature enacted statutory provisions permitting some inmates to earn positive adjustment time while incarcerated and to seek corresponding reductions in their terms of initial confinement. *See* 2009 Wis. Act 28, §§ 2720-2733h (creating the positive adjustment and release provisions in WIS. STAT. § 302.113); 2009 Wis. Act 28, §§ 2751-2763 (creating the positive adjustment provisions in WIS. STAT. § 304.06 and amending provisions in that statute related to release from confinement). The provisions took effect on October 1, 2009. *See* 2009 Wis. Act 28, § 9411. Effective August 3, 2011, the legislature prospectively repealed the provisions permitting inmates to earn positive adjustment time but permitted incarcerated offenders to petition the circuit court to reduce their terms of initial confinement by the number of days of positive adjustment time earned during the period between October 1, 2009, and August 3, 2011. *See* 2011 Wis. Act 38, §§ 38, 58, 96; *see also* WIS. STAT. § 991.11. This court recently held that some inmates are also eligible to earn positive adjustment time for periods of incarceration served after August 3, 2011. *See* ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶30, __Wis. 2d __, __ N.W.2d __. All subsequent references to WIS. STAT. §§ 302.113 and 304.06 are to the 2009-10 version.

adjustment time based on the nature and severity of his crime and because he is a violent offender within the meaning of WIS. STAT. § 16.964(12)(a).[3]

¶4 The decision to grant or deny positive adjustment time rests in the trial court's discretion. *See* ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶23, __Wis. 2d __, __ N.W.2d __; WIS. STAT. § 973.198(5). We will sustain a trial court's exercise of discretion if the trial court's conclusion is one that a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Moreover, "[a]n appellate court will search the record for reasons to sustain the [trial] court's discretionary decision." ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

¶5 Ruderman contends that he is entitled to positive adjustment time because he is eligible for it and because, while in prison, "he has learned a valuable trade and graduated with an HSED/vocational, and had no conduct reports." The trial court disagreed, concluding that the gravity of the offense and the fact that Ruderman caused the violent death of another person require that he serve every day of the initial confinement originally imposed. Ruderman would have preferred the trial court to assess his claim differently, but that does not

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[3] WISCONSIN STAT. § 16.964(12)(a) provides, in pertinent part:

> "violent offender" means a person to whom one of the following applies:
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> 1. The person has been charged with or convicted of an offense in a pending case and, during the course of the offense, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm.

demonstrate an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether the trial court exercised discretion, not whether trial court might have exercised discretion differently).

¶6 On appeal, Ruderman argues that the trial court should not have taken into account that he is a violent offender as defined in WIS. STAT. § 16.964(12)(a), because violent offenders, as defined in that statute, are not categorically excluded from an award of positive adjustment time under WIS. STAT. § 304.06(bg)1.am-o. Ruderman fails, however, to offer any persuasive reason that the trial court could not, in the exercise of its discretion, consider the legislative assessment that he is a violent offender when determining whether to award him positive adjustment time.[4]

¶7 Additionally, the record reveals that, five months before seeking positive adjustment time under WIS. STAT. § 973.198, Ruderman petitioned for a sentence adjustment under WIS. STAT. § 973.195. The latter statute permits an inmate such as Ruderman to seek a reduction in his or her term of initial confinement in prison after serving seventy-five percent of the term imposed. *See*

[4] On appeal, the State asserts that Ruderman is statutorily barred from receiving any award of positive adjustment time in light of WIS. STAT. § 302.113(2)(b)6. Under that subsection, an inmate may not receive an award of positive adjustment time if the inmate is "a violent offender, as defined in § 16.964(12)(a)." Ruderman responds that § 302.113(2)(b)6. excludes otherwise eligible inmates from earning positive adjustment time under § 302.113(2)(b) at the rate of one day for every two days served. He contends that he is eligible to earn positive adjustment time under WIS. STAT. § 304.06(1)(bg)1. at the rate of one day for every three days served and he argues that § 304.06(1)(bg)1. does not include an exclusion for those defined as violent offenders under § 16.964(12)(a). *See* § 304.06(1)(bg)1.am.-o. The State's brief does not address this argument. We conclude that the State inadequately briefed its contention that Ruderman is barred by operation of § 302.113(2)(b)6. from earning positive adjustment time under § 304.06(1)(bg)1. We affirm the trial court on other grounds.

§§ 973.195(1g)-(1r), (g). The trial court denied Ruderman a sentence adjustment, explaining:

> [t]he court finds that the full time designated for initial confinement at sentencing is necessary to punish and deter the defendant as it would unduly depreciate the seriousness of the offense if the defendant did not serve 100% of the confinement time as ordered by the court. Adjusting the confinement time would compromise the intent of the sentencing court and defeat the purpose of the sentence, which was punishment, deterrence and community protection.

The foregoing order reflects that, in the trial court's view, any reduction in the period of initial confinement would undermine the sentencing goals and result in an inadequate punishment for a grave offense.

¶8 The trial court gave Ruderman a more abbreviated response to his request for positive adjustment time under WIS. STAT. § 973.198 than to his earlier request for a sentence adjustment under WIS. STAT. § 973.195. Nonetheless, the trial court's response to Ruderman's most recent effort to obtain early release from prison reflects the trial court's unwavering belief that Ruderman committed a serious crime that warranted all of the initial confinement imposed. That is an appropriate exercise of discretion, and one that fully comports with the original sentencing rationale. At sentencing, the trial court explicitly explained to Ruderman: "there's a need to protect the public and there's a need to deter further acts such as this. You choose to drink and drive ... and you injure or kill somebody, you pay the price.... I'm not going to be soft. There is no reason for it, at all, none."

¶9 Last, we note Ruderman's suggestion that he is subject to an *ex post facto* law because the trial court's role in determining whether to award positive adjustment is more significant today than when the law governing positive

adjustment time went into effect. *Compare* WIS. STAT. § 973.198 *with* WIS. STAT. § 304.06(1)(bk). An *ex post facto* law is any law that, *inter alia*, "'makes more burdensome the punishment for a crime, after its commission[.]'" ***State v. Carpenter***, 197 Wis. 2d 252, 273, 541 N.W.2d 105 (1995) (citations and one set of quotation marks omitted). *Ex post facto* laws are prohibited by the United States Constitution in Article I, §§ 9-10, and by the Wisconsin Constitution in Article I, § 12. Because Ruderman did not raise violation of the *ex post facto* clauses as an issue in the trial court, we will not consider the issue here. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We note, however, that we rejected a similar argument in ***Singh***, 2014 WI App 43, ¶¶20-25.

By the Court.—Order affirmed.

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