COURT OF APPEALS DECISION DATED AND FILED

November 4, 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. 2013AP2029

Cir. Ct. No. 2013CV6447

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

STATE OF WISCONSIN EX REL. CLEVELAND LEE,

PETITIONER-APPELLANT,

V.

DENISE SYMDON, ADMINISTRATOR,
WISCONSIN DEPARTMENT OF CORRECTIONS,
DIVISION OF COMMUNITY CORRECTIONS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cleveland Lee, *pro se*, appeals a trial court order dismissing his petition for a writ of *certiorari*. He contends he has been discharged from the judgments in Milwaukee County case No. 2005CF63, and

that Denise Symdon, Administrator of the Department of Corrections Division of Community Corrections, erred by concluding that he remains on extended supervision. We reject his contentions and affirm.

BACKGROUND

¶2 A jury found Lee guilty of fifteen crimes charged in case No. 2005CF63. On November 9, 2005, the trial court imposed fifteen concurrent sentences.[1]

¶3 The crimes designated as counts one and three arose before the effective date of the sentencing scheme known as truth-in-sentencing. The trial court imposed an indeterminate seven-year sentence for each of those counts, and the sentences are reflected on one judgment of conviction. The remaining counts arose after the effective date of truth-in-sentencing, and Lee's sentences for those counts are reflected on a second judgment of conviction. For each of counts two and four–twelve, the trial court imposed a determinate thirteen-year term of imprisonment, bifurcated as seven years of initial confinement and six years of extended supervision. For each of counts thirteen–fifteen, the trial court imposed a three-year determinate term of imprisonment, bifurcated as one year of initial confinement and two years of extended supervision. Lee remained incarcerated following his sentencing until late July 2012, when he completed seven years of

[1] The Honorable David A. Hansher imposed sentence and entered the judgments of conviction.

initial confinement and was released to serve the extended supervision component of his thirteen-year determinate sentences.[2]

¶4 By notice dated September 4, 2012, Lee received a document captioned "Department of Corrections Discharge Certificate Cleveland Lee Sr., #486845-A ('A-01' case)." The document recited that Lee was "Sentenced to Wisconsin State Prisons on November 9, 2005 by the Circuit Court of Milwaukee County, Court Case #05CF63," and the document went on to advise Lee that "[t]he department having determined that you have satisfied said judgment, it is ordered that effective July 27, 2012, you are discharged from said judgment only."

¶5 Lee, who is serving his terms of extended supervision in Texas, apparently later received a copy of an email exchange between corrections personnel reflecting that he remained under supervision for Milwaukee County "case 05CF63 'B.'"[3] Lee then contacted Wisconsin probation and parole agent Lynn Hightire. Lee complained that Department of Corrections personnel incorrectly believed that he remained under extended supervision for sentences designated as "B" cases because, he said, he was not charged or convicted in cases designated "A" or "B"; rather, he was convicted only in Milwaukee County case No. 2005CF63. Lee contended that the discharge certificate therefore entitled him to a full discharge from the judgments. Additionally, Lee asserted, because he was never paroled for his indeterminate sentences, he was entitled to a full discharge from all of the sentences.

[2] Lee received some credit against his confinement time for days he spent in presentence custody, thus hastening his release date.

[3] A copy of the email exchange is not in the record. We take the description of the exchange from Lee's summary in another document.

¶6 Hightire's response explained to Lee that the Department of Corrections designated as "A-01" his indeterminate sentences imposed in counts one and three, and that the Department designated as "B-02" his determinate sentences imposed in count two and counts four–twelve. Although Lee had completed his A-01 sentences, Lee had not yet reached his discharge date for the B-02 sentences because he had not completed his six years of extended supervision for the latter set of sentences.

¶7 Hightire also addressed Lee's complaint that he never was released to parole for his sentences in counts one and three. She explained:

> [b]ecause all of these cases were run concurrent to each other, you were not able to release [sic] to the community until you reached your latest release date; that was 7/24/12. The fact that one sentence reached the release date did not supersede the requirement for you to remain in custody on the other active sentences.

¶8 Lee appealed unsuccessfully through the ranks of the Department of Corrections, eventually presenting his claims to Symdon. She too rejected Lee's contentions, and Lee petitioned the trial court for a writ of *certiorari*. The trial court dismissed the petition, agreeing with the agency that Lee remains on extended supervision pursuant to his sentences for count two and counts four–twelve of Milwaukee County case No. 2005CF63.[4] Lee appeals.

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[4] As the trial court similarly noted, Symdon's decision incorrectly states in two places that Lee remains subject to the authority of the Department of Corrections under the extended supervision component of his sentences "for counts 2 and 4-15." In fact, as Hightire's decision correctly reflects, Lee completed service of the entirety of his sentences in counts thirteen–fifteen while he was incarcerated. We view the discrepancies in Symdon's decision as proofreading mistakes or scrivener's errors without any legal significance.

ANALYSIS

¶9 "Judicial review on *certiorari* is limited to whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision." ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987) (italics added). We review the decision of the agency, not the decision of the trial court. *See* ***Kozich v. Employee Trust Funds Bd.***, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996).

¶10 In this proceeding, Lee claims that the agency erred in concluding that he remained subject to extended supervision because, *inter alia*: (1) he never received a grant of parole for his indeterminate sentences in counts one and three, a circumstance that he believes requires a full discharge from the entirety of the judgments upon completion of those indeterminate sentences; and (2) the judgments of conviction entered in case No. 2005CF63 do not designate some sentences as "A-01" and others as "B-02," so the discharge certificate referencing case "A-01," applies to all of his sentences. We address these contentions *seriatim*.

¶11 As a general rule, a prisoner may be paroled, pursuant to WIS. STAT. § 304.06(1)(b) (2011-12),[5] after serving a quarter of an indeterminate prison sentence, and a prisoner reaches his or her mandatory release date, pursuant to WIS. STAT. § 302.11(1), after serving two-thirds of an indeterminate prison sentence. Lee contends that these rules apply to him. Next, he points out that,

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

pursuant to WIS. STAT. § 973.15(2)(d), a prisoner serving concurrent indeterminate and determinate sentences serves the confinement portions concurrently and serves the parole and extended supervision portions concurrently. He appears to believe that, pursuant to these statutes, he should have been released to community supervision after he reached his mandatory release date for the indeterminate sentences, notwithstanding that he was at that time required to complete a term of initial confinement in service of his determinate sentences. Lee also appears to believe that, because he was not paroled, he instead received—or at least should have received—a full discharge from his longer, determinate sentences upon completing the shorter sentences.

¶12 Lee does not demonstrate that his cited authority coalesces into a basis for the relief that he seeks. To the contrary, Lee's situation is common and is governed by a long-standing rule:

> "[w]here sentences imposed at different times or for different periods of time run concurrently, the sentences run together during the time that the periods overlap; and the new or longer term does not necessarily terminate at the same time as the prior or shorter term...." [T]he prisoner will be discharged at the expiration of the longest of concurrent terms[.]

Medlock v. Schmidt, 29 Wis. 2d 114, 119, 138 N.W.2d 248 (1965) (citations omitted). Put differently, where all sentences are concurrent, "the overall sentence structure [i]s controlled by the longest sentence." *See* ***State v. Sherman***, 2008 WI App 57, ¶12, 310 Wis. 2d 248, 750 N.W.2d 500. Because Lee's longest sentences controlled the date of his release from prison, he did not receive a grant of parole during service of his shorter, indeterminate sentences.[6] As we have observed, "it

[6] Lee was not eligible for parole under his determinate sentences. *See* ***State v. Gallion***, 2004 WI 42, ¶28, 270 Wis. 2d 535, 678 N.W.2d 197; WIS. STAT. § 302.11(1z).

is in the nature of concurrent time that service of one sentence may render service of another sentence, for some purposes, superfluous." ***State v. Yanick***, 2007 WI App 30, ¶12, 299 Wis. 2d 456, 728 N.W.2d 365.

¶13 Lee offers nothing that defeats the normal application of the foregoing well-established principles governing service of concurrent sentences or leads to the conclusion that Lee received—or should have received—a discharge from the entirety of his judgments upon completing his shorter sentences. Accordingly, the Department of Corrections did not make an error of law or act arbitrarily in rejecting Lee's assertions.

¶14 Lee also contends that the text of the discharge certificate dated September 4, 2012, created a right to discharge from the entirety of the judgments. The Department of Corrections did not err in rejecting this contention and concluding that Lee remained on extended supervision after he received a discharge certificate.

¶15 The discharge certificate shows that it applies to Lee's "A-01" case, and thus the certificate reflects that the discharge applies only to some and not to all of his sentences. Assuming, as did the parties and the trial court, that the discharge certificate is ambiguous as to the precise sentences within its scope, a discharge certificate is "legally invalid" if it is "not issued 'at the expiration of the term noted on the court order.'" *See* ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶47, 353 Wis. 2d 307, 845 N.W.2d 373 (quoted source omitted). In this case, the court's order—the judgment of conviction—shows that on November 9, 2005, the trial court imposed ten concurrent thirteen-year terms of imprisonment, each bifurcated as seven years of initial confinement and six years of extended supervision. A discharge certificate purporting to discharge Lee from his thirteen-

year terms of imprisonment after he served only seven years of those sentences would therefore be legally invalid. *See* ***id.*** Lee does not show that, as of September 4, 2012, he had completed service of the thirteen-year sentences imposed in 2005.[7] Accordingly, the Department of Corrections properly concluded that Lee remained on extended supervision, regardless of any ambiguity that the parties may discern in the discharge certificate.

¶16 Lee suggests in his reply brief that he is serving illegal, excessive sentences that should be commuted pursuant to WIS. STAT. § 973.13, and that a new factor warrants sentence modification. Lee does not direct our attention to any portion of the record showing that he raised these claims in the trial court. We generally do not address claims raised for the first time on appeal. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 634, 579 N.W.2d 698 (1998). For the sake of completeness, however, we add that Lee cannot raise claims of excessive sentences or seek sentence modification here. On *certiorari* review, a court reviews the decision of the administrative agency. *See* ***Kozich***, 203 Wis. 2d at 368-69. The instant proceeding is not the appropriate forum for challenging a sentence.

¶17 Before we conclude, we note that Lee seeks to support his position with a variety of additional assertions and references to authority that we will not address individually here. We have examined his remaining contentions and

[7] In his reply brief, Lee cites several statutes that he asserts are available to permit a convicted person serving a determinate sentence to obtain early discharge from confinement and extended supervision. Lee does not claim, however, that the department or any court has applied the cited provisions to him. To the extent, if any, that Lee intended to make such a claim, we conclude that it is inadequately briefed and lacks any support in the record. Accordingly, we do not discuss the claim further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

conclude that they patently provide no basis for relief. To give but one example, Lee suggests that we should set aside the agency's decision based on a provision in the 1997-98 version of the Wisconsin statutes governing worker's compensation. We decline to explain why this and other inapt arguments and citations warrant no relief. "'An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.'" ***County of Fond du Lac v. Derksen***, 2002 WI App 160, ¶4, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted). We are fully satisfied from our review of the briefs and the record that the Department of Corrections kept within its jurisdiction, acted according to law, and reached a decision that was neither arbitrary nor oppressive, and we are equally satisfied that the evidence of record supports the decision that Lee properly remains on extended supervision. *See* ***Staples***, 136 Wis. 2d at 493. We affirm.

By the Court.—Order affirmed.

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