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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Case No. 2013AP1724

STATE OF WISCONSIN EX REL.
AMAN SINGH,

Petitioner-Appellant,

v.

PAUL KEMPER, WARDEN,
RACINE CORRECTIONAL INSTITUTION,

Respondent-Respondent.

ON APPEAL FROM THE CIRCUIT COURT'S
ORDER QUASHING WRIT OF HABEAS
CORPUS AND DISMISSING PETITION, FILED
IN RACINE COUNTY, THE HONORABLE
GERALD P. PTACEK, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF
RESPONDENT-RESPONDENT

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RESPONDENT-RESPONDENT

STATEMENT OF THE ISSUE

The circuit court properly dismissed Singh's petition for writ of habeas corpus because Singh was not entitled to positive adjustment time as a matter of law. On the contrary, Singh had not

served *any* prison time during the period when positive adjustment time was available for him to earn.

The retroactive applicability of Wis. Stat. § 973.198 (2011-12) does not violate the Ex Post Facto clause.

Singh is not entitled to receive positive adjustment time for his time spent in county jail.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

RELEVANT PROCEDURAL BACKGROUND

Convictions and Sentences:

On March 29, 2010, Petitioner Aman D. Singh was convicted in Waukesha County case number **2008-CF-1368** of obtaining a controlled substance by fraud, in violation of Wis. Stat. § 961.43(1)(a) (8:13-15; R-Ap. 113-15) On April 29, 2010, Singh was sentenced in that case to one-and-a-half years initial confinement and one-and-a-half years extended supervision, *imposed and stayed*, for three years of probation with various conditions (*id.*).

On November 9, 2011, Singh was convicted in Milwaukee County case number **2011-CF-4192** for obtaining a controlled substance by fraud, in violation of Wis. Stat. § 961.48(1)(b), second and subsequent offense (8:17-18; R-Ap. 117-18). Also

on November 9, 2011, Singh was convicted in Milwaukee County case number **2011-CF-4004** for (Count 1) obtaining a controlled substance by fraud, in violation of Wis. Stat. § 961.48(1)(b) second and subsequent offense (8:20; R-Ap. 120). He was also convicted in case number **2011-CF-4004** for (Count 3) obtaining a prescription drug by fraud, in violation of Wis. Stat. § 450.11(7)(a) (8:22; R-Ap. 122).

On December 13, 2011, Singh's probation in Waukesha County case number **2008-CF-1368** was revoked and the aforementioned stayed prison sentence imposed (8:25; R-Ap. 125).

On December 29, 2011, Singh was sentenced for (Count 1) obtaining a controlled substance by fraud in case number **2011-CF-4004** to two years confinement in prison and three years extended supervision (8:20; R-Ap. 120). The sentence was to be concurrent to Count 3 *and* to case number **2011-CF-4192**, but consecutive to any other sentence (*id.*). In Count 3 of case number **2011-CF-4004**, Singh was sentenced to six months in the House of Corrections, concurrent to Count 1. (8:22; R-Ap. 122). Likewise, on December 29, 2011, Singh was sentenced for case number **2011-CF-4192** to two years initial confinement and three years extended supervision, concurrent to any other sentence (8:17; R-Ap. 117).

Singh's Petition for Positive Adjustment Time:

On May 2, 2012, the Department of Corrections (DOC) sent a letter informing the Waukesha County Circuit Court that Singh had filed a Petition for Positive Adjustment Time (PAT) for the sentence imposed in case number

2008-CF-1368 (8:27; R-Ap. 127). The DOC informed the court that since Singh had not served *any* prison time during the period of October 1, 2009 to August 3, 2011, he was not eligible for PAT as a matter of law (*id.*).

Singh's Petition for Writ of Habeas Corpus:

On June 28, 2013, Singh filed his Petition for a Writ of Habeas Corpus (1).¹ In his petition, he forwarded three arguments. First, because Wisconsin Statutes require consecutive prison sentences to be calculated as one continuous term, it is impossible to assign any particular day earned as Positive Adjustment Time (PAT) to a particular sentence. Second, that the language of Wis. Stat. §§ 302.113(2)(b) and 304.06(1)(bg)1 (2009-10) make PAT *mandatory*, not discretionary. Third, that the repeal of 2009 Act 28 constitutes an “ex post facto violation” as applied to him (*id.*).

The circuit court held a hearing on July 29, 2013.² After the hearing, the court entered an order quashing Singh's writ of habeas corpus and dismissing the petition (10; R-Ap. 141).

Singh appeals.

¹ On July 18, 2013, Singh submitted three separate Petitions for Sentence Adjustment in circuit court on all of his criminal sentences (8:29-36; R-Ap. 129-36).

² Singh did not make available the hearing transcript as part of the record. Singh argues in his appellate brief that his “pro se appeal does not concern any discretionary decision of the trial court” (Singh br. at 1). According to Singh, “[w]hile a telephonic hearing was conducted in this matter, no evidence was introduced or testimony taken during that hearing. Therefore, a transcript of that hearing is unnecessary for this appeal” (*id.*).

STANDARD OF REVIEW

The sole issue on appeal is whether, pursuant Wis. Stat. § 973.198 (2011-12), Singh was entitled to positive adjustment time. This is a statutory construction question that this Court reviews de novo. *See, i.e., State v. Harris*, 2011 WI App 130, ¶6, 337 Wis. 2d 222, 805 N.W. 2d 386 (applying a de novo review on the issue of whether the defendant was entitled to “good time” credit); *See also State v. Presley*, 2006 WI App 82, ¶4, 292 Wis. 2d. 734, 715 N.W. 2d 713 (providing that an appellate court’s review of the application of statutes to undisputed facts is a question of law reviewed de novo).

ARGUMENT

SINGH SERVED NO TIME IN PRISON DURING THE EFFECTIVE DATES IN WHICH HE COULD HAVE EARNED POSITIVE ADJUSTMENT TIME (PAT). THEREFORE, THE CIRCUIT COURT PROPERLY DISMISSED HIS PETITION.

A. Prior Statutes Providing Positive Adjustment Time:

Wisconsin Statutes § 304.06(1)(bg) and (1)(bk) (2009-10) were two of the various statutes providing for and regulating PAT that the legislature repealed as of August 3, 2011. *See* 2011 Wisconsin Act 38, §§ 58–59; *see also* 2011 Wisconsin Act 38, §§ 38–41, 60–61, 88. If an inmate served time in prison between October 1, 2009 and August 3, 2011, the statutes permitted the inmate to petition for release from confinement after serving the initial confinement

portion of his bifurcated sentence. Wis. Stat. § 304.06(1)(bg) (2009-10) provided in relevant part:

The person may petition the *earned release review commission* for release to extended supervision when he or she has served the term of confinement in prison portion of his or her bifurcated sentence, as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., less positive adjustment time he or she has earned.

(emphasis added).

Pursuant to Wis. Stat. § 304.06(1)(bk) (2009-10)³, the circuit court then had the option of accepting or rejecting the determination that an inmate had earned PAT. The circuit court could thus permit an early release from incarceration or could order the inmate to remain in prison for a period that did not exceed the inmate's term of initial confinement. *See id.*

B. The Repeal of the Statutes Providing for PAT:

Wisconsin Statute § 973.198 was created in light of the repeal of 2009 Act 28, effective August 4, 2011. In relevant part, it provides the following:

When an inmate who is serving a sentence imposed under s. 973.01 and who has earned

³ This statute provided in relevant part: “The court may accept the earned release review committee’s . . . determination that the inmate has earned positive adjustment time under par. (bg), reject the . . . determination . . . or order the inmate to remain in prison for a period that does not exceed the time remaining on the inmate’s term of confinement.” Wis. Stat. § 304.06(bk)2.b. (2009-10).

positive adjustment time under s. 302.113⁴, 2009 stats., or under s. 304.06, 2009 stats., *has served the confinement portion of his or her sentence less positive adjustment time earned between October 1, 2009, and August 3, 2011, he or she may petition the sentencing court to adjust the sentence under this section, based on the number of days of positive adjustment time the inmate claims that he or she has earned.*

Wis. Stat. § 973.198 (2011-12) (emphasis and footnote added).

Therefore, although the Wisconsin Legislature repealed portions of Wis. Stat. § 304.06 (2009-10) that precluded the possibility of earning PAT after August 3, 2011, it also created Wisconsin Statute § 973.198 (2011-12) which guaranteed the right of any inmate who had served prison time between October 1, 2009 and August 3, 2011, to apply for PAT potentially earned during that same time period. Additionally, the change in law did not lengthen an inmate's sentence as he would not have been released before his entire initial confinement was served.

⁴ This statute provides in relevant part that “an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed under s. 973.01[.]” Wis. Stat. § 302.113(2)(a). It also provides that an inmate sentenced “for a misdemeanor or for a Class F to Class I felony that is not a violent offense . . . may earn one day of [PAT] for every 2 days served[.]” Wis. Stat § 302.113(b)2.b. (2009-10).

C. The Change in the Law Regarding PAT is not Relevant to the Sentence Singh is Serving. Singh Served *No Time* in Confinement Between October 1, 2009 and August 3, 2011.

Under Wis. Stat. § 973.198(1) (2011-12), Singh may petition the sentencing court for sentence adjustment based on positive adjustment time once he “has served the confinement portion of his . . . sentence less positive adjustment time earned between October 1, 2009, and August 3, 2011.”

Singh never served – *nor does he dispute* that he never served – time in prison between October 1, 2009 and August 3, 2011. Consequently, he never earned any PAT and the sentencing court could not adjust his sentence. In this case Singh was placed on probation in case number **2008-CF-1368** on April 29, 2010, with an imposed and stayed prison sentence looming over him. His probation was not revoked until December 13, 2011.

Singh was sentenced to prison in case number **2011-CF-4004** and case number **2011-CF-4192** on December 29, 2011. Singh first served a day in prison on January 4, 2012, which was months after Wis. Stat. §§ 302.113 and 304.06 (2009-10) were repealed. Therefore, he could not earn any PAT.

**D. The Retroactive Applicability of
Wis. Stat. § 973.198 (2011-12) Does
Not Violate the Ex Post Facto
Clause.**

Singh argues that the retroactive application of Wis. Stat. § 973.198 (2011-12) is a violation of the Ex Post Facto clause of the United States Constitution (and Article I, section 12 of the Wisconsin Constitution⁵) as applied to him. The burden is on Singh to establish this violation. See *California Dep't of Corrections v. Morales*, 514 U.S. 499, 510 n.6 (1995).

Article I, § 10, of the United States Constitution prohibits a State from passing any “ex post facto Law.” In *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925), the Court stated that:

any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

“[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.” *Dobbert v. Florida*, 432 U.S. 282, 293 (1977) (internal citation omitted). Therefore,

⁵ Article I, § 12 of the Wisconsin Constitution states: “No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.”

“[e]ven though it may work to the disadvantage of a defendant, a *procedural* change is not *ex post facto*.” *Id.* (emphasis added).

1. *Weaver v. Graham*, 450 U.S. 24 (1981).

Singh relies on *Weaver v. Graham*, 450 U.S. 24 (1981), to support his claim that the new law violates the Ex Post Facto clause. In *Weaver*, the Supreme Court held that the Ex Post Facto clause forbids the States to enhance the measure of punishment by altering the substantive “formula” used to calculate the applicable sentencing range. In *Weaver*, the petitioner had been sentenced to 15 years in prison for his crime of second-degree murder. Both at the time of his crime and at the time his sentence was imposed, Florida state statutes provided a formula for mandatory reductions to the terms of all prisoners who complied with certain prison regulations and state laws. The statute that the petitioner challenged reduced the amount of “gain time” credits available to prisoners under this formula. Though the statute preserved the possibility that some prisoners might win back these credits if they convinced prison officials to exercise their discretion to find that they were deserving, the Supreme Court found that it effectively eliminated the lower end of the possible range of prison terms. *Id.* at 26-27, 31-33. It therefore held that the statute was unconstitutional as an Ex Post Facto law as applied to the petition. *Id.*

The facts in the instant case are, however, distinguishable from *Weaver*. First, unlike the “good time” statutes in *Weaver*, the Wisconsin Legislature never intended the provision of PAT to be *mandatory*, as the sentencing court and other

entities could exercise their discretion to deny it. *See* Wis. Stat. §§ 302.113 (2009-10); 304.06 (2009-10); 973.198 (2011-12).

Second, although the Wisconsin Legislature repealed portions of Wis. Stat. §§ 302.113 and 304.06 (2009-10) that precluded the possibility of earning PAT after August 3, 2011, it also created Wis. Stat. § 973.198 (2011-12), which guaranteed the right of any inmate who had served prison time between October 1, 2009 and August 3, 2011, to apply for PAT potentially earned during that same time period. Therefore, had Singh been eligible for PAT, Wis. Stat. § 973.198 (2011-12) preserves his and other inmates' right to seek it. *See* Wis. Stat. § 973.198 (2011-12). And as previously indicated, “[e]ven though it may work to the disadvantage of a defendant, a *procedural* change is not *ex post facto*.” *Dobbert*, 432 U.S. at 293 (emphasis added).

Third, unlike the petitioner in *Weaver*, Singh was never eligible to earn PAT as he did not serve a day in prison until January 4, 2012, which was months after Wis. Stat. §§ 302.113 and 304.06 (2009-10) became inapplicable. *See* Wis. Stat. §§ 302.113 (2009-10); 304.06 (2009-10); 973.198 (2011-12). Ultimately, Singh's punishment was not increased beyond what was prescribed by the repeal of portions of Wis. Stat. §§ 302.113 and 304.06 (2009-10), because he was never eligible to earn it during the effective dates of those statutes. *See Weaver*, 450 U.S. at 29-31; Wis. Stat. §§ 304.06 (2009-10); 973.198 (2011-12).

**2. California Department of
Corrections v. Morales, 514 U.S.
499 (1995).**

Subsequent to *Weaver*, the United States Supreme Court stated in *California Department of Corrections v. Morales* that

the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of ‘disadvantage,’ nor . . . on whether an amendment affects a prisoner’s ‘opportunity to take advantage of provisions for early release,’ but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

514 U.S. at 506 n.3 (1995) (internal citations omitted).

In *Morales*, the Supreme Court addressed an amendment to a California statute that allowed the Board of Prison Terms to defer parole suitability hearings for up to three years for certain inmates, one of which was the petitioner, while under the old statute, the petitioner would have been entitled to suitability hearings every year. *Id.* at 503. The petitioner argued that the amendment constituted an Ex Post Facto law. But the Supreme Court found that the “amendment create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause.” *Id.* at 509. The Supreme Court

based this holding in part on the fact that the Board had the authority under the new statute to tailor the frequency of suitability hearings to the needs of individual prisoners. *Id.* at 510-12.

In this case, Singh has failed to demonstrate or even argue that the new statute *increases his penalty* by which his crime was punishable. *See Morales*, 514 U.S. at 506 n.3. Rather, he relies on the language in *Weaver* and argues that “the retroactive elimination of such early release **opportunities** that were available by law when an offense was committed is a violation of ex post facto provisions” (Singh br. at 4) (emphasis added). But as noted above, *Morales* provided that such “opportunities” are *not* the focus of an Ex Post Facto inquiry, but the focus is rather “on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.” 514 U.S. at 506 n.3.

Finally, Singh argues that the retroactive application of Wis. Stat. § 973.198 (2011-12) violates the Ex Post Facto clause because “it turned Singh’s discretionary sentence into a mandatory sentence of 42 months” (Singh br. at 7). As indicated above, however, a circuit court has *discretion* under the new statute to “to adjust the [petitioner’s] sentence” for time served under the applicable time period. Wis. Stat. § 973.198 (2011-12).

**E. Singh is not Entitled to Receive
PAT for His Time Spent in County
Jail.**

Finally, Singh argues that he is entitled to positive adjustment time for the time he spent in a *county jail*, citing Wis. Stat. § 973.155 (2011-12). That statute provides in part that sentence credit “shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.” Wis. Stat. § 973.155(3) (2011-12). According to Singh, the time he “served in the county jail before reception at Dodge Correctional Institution is prison time” (Singh br. at 9).

Singh’s argument is misplaced. Singh *did* receive 159 days sentence credit pursuant to Wis. Stat. § 973.155 (2011-12) in case number 2008-CF-1368 (8:15; R-Ap.115). However, the time he spent “in custody” at the county jail is irrelevant to earning PAT, which he could have earned only in *confinement* in prison (under either statute). See Wis. Stat. §§ 304.06(1)(bg) (2009-10); 973.198 (2011-12). And as previously indicated, and not refuted by Singh, he never served a day in confinement between October 1, 2009, and August 3, 2011.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm the circuit court’s order quashing the writ of habeas corpus and dismissing the petition.

Dated this 25th day of October, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2981 words.

Sara Lynn Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of October, 2013.

Sara Lynn Larson
Assistant Attorney General