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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I V

Case No. 2022AP1129

STATE OF WISCONSIN EX REL.
CHRISTOPHER P. KAWLESKI,

Petitioner-Appellant,

v.

STATE OF WISCONSIN,

Respondent-Respondent.

ON APPEAL FROM AN ORDER DENYING A PETITION
FOR WRIT OF HABEAS CORPUS ENTERED IN THE
JEFFERSON COUNTY COURT, THE HONORABLE
WILLIAM F. HUE, PRESIDING

BRIEF OF RESPONDENT-RESPONDENT

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INTRODUCTION

Christopher P. Kawleski appeals an order denying his petition for writ of habeas corpus. Kawleski claims that he has served his 20-year sentence that was entered in 2001 and is being illegally held in custody on extended supervision. The circuit court denied Kawleski's claim after a hearing in which the offender records supervisor at Oshkosh Correctional Institution explained that Kawleski's maximum discharge date was extended twice due to his extended supervision being revoked, and that his discharge date to extended supervision was July 2, 2022, and his maximum discharge date is May 14, 2033. On appeal, Kawleski argues that his maximum discharge date could not properly be extended, and that once 20 years passed since he started serving his 20-year sentence, he should have been released from all custody. However, the law provides that when a person's extended supervision is revoked and he is reconfined, he still must serve all of the originally ordered extended supervision. Kawleski's extended supervision was revoked twice. Each time, he was re-confined and his maximum discharge date was accordingly extended. Kawleski has not shown that it was improper to extend his maximum discharge date or that he is being held beyond his maximum discharge date. The circuit court properly denied Kawleski's petition, and this Court should affirm.

ISSUES PRESENTED¹

1. Is Kawleski being held beyond his maximum discharge date?

¹ The State has renumbered the issues Kawleski raises because the primary issue in this case is whether Kawleski is being held beyond his maximum discharge date—the third issue Kawleski raises.

The circuit court answered “no.”

This Court should affirm.

2. Was Kawleski convicted of any additional crimes after his conviction in this case?

It does not appear that Kawleski raised this issue in the circuit court, so the circuit court did not answer.

This Court should affirm.

3. Were Kawleski’s rights violated when his extended supervision was revoked in 2018?

It does not appear that Kawleski raised this issue in the circuit court, so the circuit court did not answer.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the state’s brief, and the issues presented require only the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

Kawleski was convicted of first-degree sexual assault of a child in 2001 after he pled guilty to the charge. (R. 26.) The circuit court imposed a 20-year sentence, including two years and six months of initial confinement and 17 years and six months of extended supervision. (R. 32:37.) Kawleski was released to extended supervision after he served two years, 5 months, and 27 days of initial confinement. (R. 83:6–7.) His extended supervision was revoked, and he was ordered reconfined for two years in 2005. (R. 56:30.) Kawleski’s extended supervision was revoked again in 2018, and he was ordered reconfined for four years, seven months, and 26 days.

(R. 87:33.) Due to the two revocations, Kawleski's discharge date to extended supervision was extended to July 2, 2022. (R. 83:6.) He had ten years, ten months, and 12 days of extended supervision remaining, so his maximum discharge date was extended to May 14, 2033. (R. 83:6, 8.)

On October 7, 2021, Kawleski filed a petition for writ of habeas corpus in the court of appeals. (R. 72.)² This Court referred the petition to the circuit court. (R. 76.) The circuit court held a hearing on the petition. (R. 83.) The prosecutor explained at the hearing that the issue was Kawleski's claim "that he should have already been discharged on this case and that he is being illegally detained past his release date." (R. 83:6.) The offender records supervisor at Oshkosh Correctional Institution testified and explained that due to Kawleski's two revocations, his discharge date to extended supervision was July 2, 2022; but he had ten years, ten months, and 12 days of extended supervision remaining; and his maximum discharge date was therefore May 14, 2033. (R. 83:6–8.) The circuit court concluded that the offender records supervisor's explanation was "clear" and that Kawleski is not entitled to relief. (R. 83:9.) The court later signed a written order denying Kawleski's petition. (R. 116:1.)

Kawleski now appeals. (R. 88; 116.)

STANDARD OF REVIEW

A defendant petitioning for writ of habeas corpus has the burden "of showing that his detention is illegal by a preponderance of the evidence." *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 276, 392 N.W.2d 453 (Ct. App. 1986) (*abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900) (citing *Walker v. Johnston*, 312 U.S. 275, 286 (1941));

² Kawleski's petition for writ of habeas corpus does not appear to be included in the appellate record.

State ex rel. Alvarez v. Lotter, 91 Wis. 2d 329, 334, 283 N.W.2d 408 (Ct. App. 1979). “A circuit court’s order denying a petition for writ of habeas corpus presents a mixed question of fact and law.” *State v. Pozo*, 2002 WI App 279, ¶ 6, 258 Wis. 2d 796, 654 N.W.2d 12 (citing *McMillan*, 132 Wis. 2d at 276). Factual determinations will not be reversed unless clearly erroneous. *Id.* (citing *McMillan*, 132 Wis. 2d at 276). The circuit court’s legal conclusions are subject to independent review, *McMillan*, 132 Wis. 2d at 276 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980)) (additional citations omitted).

ARGUMENT

The circuit court properly denied Kawleski’s petition because he did not show that his maximum discharge date was improperly extended due to his revocations.

Kawleski claims he is being held beyond his maximum discharge date. (Kawleski’s Br. 17–18, 23.) He asserts that since he was given a 20-year sentence in 2001, with a maximum discharge date of June 19, 2021, he cannot properly be held beyond that date. (Kawleski’s Br. 17–18.) However, as the offender records supervisor at Oshkosh Correctional Institution explained, Kawleski’s maximum discharge date was extended due to the two revocations of his extended supervision, as required by the applicable statute and administrative code sections. (R. 83:6, 8.)

A. When a person’s extended supervision is revoked, he is subject to reconfinement for the entire period of extended supervision that he was initially ordered to serve.

Wisconsin Stat. § 973.01(1) provides that “whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31,

1999 . . . the court shall impose a bifurcated sentence under this section.” Subsection two explains that a bifurcated sentence “consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113.” Wis. Stat. § 973.01(2). The “total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision.” Wis. Stat. § 973.01(2).

An inmate serving a bifurcated sentence is entitled to release to extended supervision after serving the confinement portion of the sentence imposed. Wis. Stat. § 302.113(2). If the person “violates a condition of extended supervision, the reviewing authority may revoke the extended supervision” of the person. Wis. Stat. § 302.113(9)(am). If an offender’s extended supervision is revoked, “the reviewing authority shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence.” Wis. Stat. § 302.113(9)(am). “The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence.” Wis. Stat. § 302.113(9)(am).

“A person who is subsequently released to extended supervision after service of the period of time specified by the order under par. (am)” must continue to serve the remaining extended supervision portion of the bifurcated sentence. Wis. Stat. § 302.113(9)(c). “The remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence, less the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of

extended supervision under the bifurcated sentence.” Wis. Stat. § 302.113(9)(c).

B. When a person is reconfined, his maximum discharge date is extended.

When a defendant is ordered reconfined, the time remaining on his sentence is “the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence.” Wis. Stat. § 302.113(9)(am). And “the remaining extended supervision” period “is the total length of the bifurcated sentence, less the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the bifurcated sentence.” Wis. Stat. § 302.113(9)(c). In other words, under Wis. Stat. § 302.113(9), a defendant receives credit for any time served in confinement pursuant to a sentence, whether initial confinement or re-confinement. But he does not receive credit for time served on extended supervision before his revocation.

Wisconsin Admin. Code § DOC 302.29(3) governs the calculation of the discharge date after a person whose extended supervision is reconfined. It provides that “[a]n inmate’s maximum discharge date shall be recalculated by adding the remainder of the sentence to the date of custody after violation and subtracting credit received.” Wis. Admin. Code § DOC 302.29(3). “The remainder of the sentence is the *entire sentence* less time served in custody *prior to release to community supervision.*” Wis. Admin. Code § DOC 302.29(3) (emphases added). Again, the person receives credit for time served in confinement towards his revocation sentence, but not for time served on extended supervision before his

revocation. The full supervision portion of a bifurcated sentence must be served *after* the person's latest release from initial confinement or re-confinement. See Wis. Stat. § 302.113(9)(c).

C. DOC properly extended Kawleski's maximum discharge date due to his revocations.

A Corrections Complaint Examiner (CCE) Report from DOC dismissing Kawleski's appeal (A-App. 5), and the testimony of the offender records supervisor at the hearing on Kawleski's petition for writ of habeas corpus (R. 83:6–8), confirm that Kawleski is not being held beyond his maximum discharge date. Kawleski received a 20-year sentence in 2001. (R. 32:37.) When the court sentenced Kawleski, it informed him that “While you are under extended supervision, you are subject to certain conditions. If you violate those conditions, you may be returned to prison to serve not more than the time remaining on your sentence.” (R. 32:41.) And the court informed him that “The time remaining on your sentence is the total length of your sentence less any time served in custody.” (R. 32:41.) Kawleski was released to extended supervision after he had served two years, five months, and 27 days in prison. (R. 83:6.) His extended supervision was revoked in 2005. (R. 58:4–5.) As the offender records supervisor testified, Kawleski could have been reconfined for up to 17 years, six months, and three days—his entire 20-year sentence minus the two years, five months, and 27 days he spent in prison. (R. 83:6.) Kawleski was ordered reconfined for two years. (R. 56:30.) Kawleski's release to extended supervision was set for May 27, 2007. (R. 56:7.) And since Kawleski had served two years, five months, and 27 days in prison, and was reconfined for two years, he had 15 years, six months, and eight days of extended supervision remaining (20 years minus four years, five months, and 27 days in prison). (R. 56:7.)

After Kawleski was again released to extended supervision, his extended supervision was revoked a second time, and he was ordered re-confined a second time for four years, seven months, and 27 days, with credit for five months and 19 days of pre-revocation confinement. (R. 83:7.) Kawleski began serving his second re-confinement on November 6, 2017. (R. 83:7.) He had already served four years, seven months, and 26 days in prison, so his date for release to extended supervision was set for July 2, 2022. (R. 83:7–8.) The remaining time on his sentence was ten years, ten months, and 12 days, because, again, he properly received credit for previous periods of confinement, but not for previous periods of supervision. (R. 83:8.) Kawleski's maximum discharge date is therefore May 14, 2033. (R. 83:6.)

The circuit court relied on the offender records supervisor's calculations and testimony. (R. 83:9.) Kawleski has not shown that any of the information or calculations on the CCE Report or in the offender records supervisor's testimony were incorrect. The record conclusively demonstrates that DOC properly extended Kawleski's maximum discharge date. Kawleski failed to prove that he is being held beyond his maximum discharge date, so his petition was properly denied. *McMillian*, 132 Wis. 2d at 276.

D. Kawleski has not shown that extending his maximum discharge date because of his revocations and reconfinement violates Wis. Stat. § 973.01 or his rights to due process, equal protection, or to be free from double jeopardy.

Kawleski acknowledges that DOC employees have explained to him more than once that his maximum discharge date was extended beyond the original date of June 19, 2021 due to his revocations. (Kawleski's Br. 18–19.) But he argues that extending his maximum discharge date so that he will serve more than 20 years of confinement plus extended

supervision violates Wis. Stat. § 973.01 and his rights to due process, equal protection, and to be free from double jeopardy. (Kawleski's Br. 19.)

However, Wis. Stat. § 973.01 provides that a bifurcated sentence consists of a term of initial confinement and a term of extended supervision. It does not concern the extension of a sentence due to revocation. As explained above, Wisconsin Stat. § 302.113(9)(c) explicitly provides that when the extended supervision of a person's bifurcated sentence is revoked and he is re-confined, his remaining time on extended supervision is his total bifurcated sentence minus any periods of confinement spent on the sentence. In other words, any time previously spent on supervision doesn't count. That makes sense, because the purpose of supervision is to test the person's ability to obey the law and conditions of supervision for the amount of time the sentencing judge has assessed is necessary to ensure his rehabilitation. If the person fails that test (once or, as in Kawleski's case, repeatedly), it only makes sense to readminister the entire test after re-confinement. The extension of Kawleski's maximum discharge date in accordance with Wisconsin law did not violate Wis. Stat. § 973.01.

Kawleski has not shown that extending his maximum discharge date in accordance with law violates his rights to be free from due process or equal protection. This Court should decline to review his undeveloped and unsupported argument. *State v. Pettit*, 171 Wis. 2d 627, 642, 492 N.W.2d 633 (Ct. App. 1992).

And Kawleski was not subjected to double jeopardy. The prohibition against double jeopardy affords a convicted person protection against multiple punishments for the same crime. *State ex rel. Ludtke v. DOC Div. of Probation and Parole*, 215 Wis. 2d 1, 13, 572 N.W.2d 864 (Ct. App. 1997). This Court has explained "service in prison of time successfully served on parole and forfeited through revocation

does not constitute punishment within the meaning of the double jeopardy clause.” *Id.* at 14 (citation omitted). Instead, “[t]he possibility that [a] maximum discharge date will be extended is part of the parole . . . system to which a prisoner’s sentence is subject. That possibility does not arise out of a new sentence. It is part of the conditions which attached to the original sentence.” *State ex rel. Bieser v. Percy*, 97 Wis. 2d 702, 709, 295 N.W.2d 179 (Ct. App. 1980). The same is logically true when a person is reconfined after revocation of extended supervision. Kawleski has not shown that he is being held beyond his maximum discharge date, so his petition was properly denied. *McMillian*, 132 Wis. 2d at 276.

II. Kawleski is not entitled to relief on his claim that he was not convicted of additional crimes matters in calculating his maximum discharge date.

Kawleski asserts that whether he was convicted of additional crimes other than his 2001 sexual assault of a child is an issue in this case. (Kawleski’s Br. 8–15.) It is unclear whether Kawleski raised the issue in his petition for writ of habeas corpus, because he has not included his petition in the appellate record. And Kawleski did not address the issue at the hearing on his petition. Accordingly, the circuit court did not err by not addressing it.

Kawleski’s claim is also meritless. It appears that Kawleski is claiming that since he was not convicted of additional crimes, he has served his 20-year sentence and should be released. But it makes no difference whether Kawleski was convicted of other crimes because, as explained above, Kawleski’s sentence and maximum discharge date was extended because his extended supervision was revoked and he was reconfined, not because of additional crimes. Therefore, even if Kawleski has not been convicted of additional crimes, he is not entitled to relief.

III. Kawleski is not entitled to relief on his claim that the State cannot show that his rights were not violated when his extended supervision was revoked.

Kawleski asserts that whether the State can “describe the process by which Kawleski’s substantive due process, procedural due process, and equal protection rights were adhered to, before, during, and after, the revocation . . . on November 28, 2018,” and whether his *Miranda*³ rights were read to him, is an issue in this case. (Kawleski’s Br. 15–17.) He seems to be arguing that his rights were violated when his extended supervision was revoked. Again, it is unclear whether Kawleski raised the issue in his petition for writ of habeas corpus, because he has not included his petition in the appellate record. And Kawleski did not address the issue at the hearing on his petition. Accordingly, the circuit court did not err by not addressing it.

And again, Kawleski’s claim is meritless. Kawleski acknowledges that he “mailed a revocation hearing waiver to the Division of Hearings and Appeals.” (Kawleski’s Br. 15.) Kawleski seems to argue that because he did not mail the waiver to his probation officer or the Department of Corrections, but only to the Division of Hearings and Appeals, which submitted it to the Department of Corrections, his waiver was somehow invalid. But Kawleski offers nothing supporting his argument.

Kawleski also asserts that he was not read the *Miranda* warnings when he was questioned by probation agents. (Kawleski’s Br. 16–17.) But he does not explain why, even if that were true, it would entitle him to relief.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

CONCLUSION

This Court should affirm the circuit court order denying Kawleski's petition for writ of habeas corpus.

Dated: May 19, 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3029 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of May 2023.

Electronically signed by:

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