COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1088

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

STATE OF WISCONSIN EX REL. JAMES TURNER,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARING AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

SCHUDSON, J. James Turner appeals from the trial court order denying his petition for a writ of certiorari to review the decision to revoke his parole. He argues that the order for forfeiture of twelve years of good time is arbitrary and capricious. He also argues that RULE 809.32, STATS., violates his

right to equal protection under the law and is therefore unconstitutional as it applies to a defendant with an appointed attorney who files an appeal on his behalf. We affirm.

BACKGROUND

On November 27, 1972, James Turner was convicted of first-degree murder, in violation of § 940.01, STATS., 1971, and sentenced to life in prison. His sentence was later commuted to fifty years. On March 13, 1987, he was sentenced to six months' imprisonment, consecutive, for escape, in violation of § 946.42(3)(a), STATS. Turner was paroled on December 29, 1989; he was taken into custody on January 6, 1990, and parole was revoked. A second parole occurred in March 1991 and was revoked in July 1991. On March 25, 1996, Turner was paroled for the third time. About four months later, revocation proceedings were considered due to admitted violations of parole supervision rules regarding use of alcohol and illicit drugs, failure to attend treatment, and failure to report for work. On August 29, 1996, in lieu of revocation, the Department of Corrections allowed Turner to sign an alternative to revocation agreement requiring that he abide by all rules of supervision and by all rules of the Habitual Offender Supervisory Team program.

During September 1996, Turner violated parole rules by going to Milwaukee County, consuming alcohol, using marijuana and cocaine, battering his wife, and driving an automobile without a license. On November 20, 1996, Turner pled no contest to a criminal charge of aggravated battery to his wife, a class E felony, in violation of § 940.19(2), STATS., and was convicted and sentenced to one year in prison. During a parole revocation hearing before an administrative law judge (ALJ) on November 22, Turner admitted he was guilty of

all alleged violations of parole rules. On December 17, 1996, the ALJ revoked parole, ordered forfeiture of twelve years of good time as requested by the Department, and ordered that Turner "be entitled to earn good time on the amount forfeited." An administrative review by the Division of Hearings and Appeals resulted in an order affirming the revocation.

Turner filed a petition for a writ of certiorari, seeking reversal of the parole revocation decision. The petition alleged that the computation of the amount of good time subject to forfeiture and the order of forfeiture of twelve years' good time for a "relatively minor violation of parole" was in error. The trial court issued a writ of certiorari commanding David Schwarz, as administrator of the Division, to certify and return to the trial court a written transcription of, and all records relating to, the parole revocation proceedings. Counsel for Turner filed a "memorandum and no merit report in support of petition for writ of certiorari" which stated:

> Here, the defendant firmly believes that the department incorrectly calculated the amount of good time which was available for forfeiture. Counsel, however, has been unable to either understand the defendant's argument nor [sic] to locate any law which supports the argument. Thus, it is respectfully requested that the court give Turner an opportunity to present his own legal arguments on this issue.

As permitted by the trial court, Turner subsequently filed a *pro se* brief raising the calculation issue.

On January 15, 1998, the trial court issued an order denying the request for a writ of certiorari regarding the review of the parole revocation decision. Turner has appealed from this order.[1]

DISCUSSION

"[T]he review process for both probation and parole revocation is identical." ***State ex rel. Macemon v. Christie***, 216 Wis.2d 337, 342 n. 3, 576 N.W.2d 84, 86 n. 3 (Ct. App. 1998). The right to "review of a revocation hearing is by certiorari directed to the court of conviction" and the scope of the review is limited to a determination of whether the revocation was done in an arbitrary and capricious manner. *See* ***State ex rel. Johnson v. Cady***, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971). Our supreme court has declared:

> [O]n review by certiorari the reviewing court is limited to determining: (1) Whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

State v. Goulette, 65 Wis.2d 207, 215, 222 N.W.2d 622, 626 (1974).

When considering whether revocation of Turner's parole is justified, we do not weigh the evidence; our inquiry must be limited to whether there is substantial evidence to support the revocation decision. *See* ***Van Ermen v. DHSS***,

[1] In a one-judge order entered on June 26, 1998, this court: (1) noted that Turner was "'statutorily barred from proceeding *pro se* during the pendency of an appeal in which he is represented by counsel'"; (2) rejected the June 22, 1998, brief submitted on Turner's behalf by his appointed appellate counsel; and (3) extended the deadline for filing a new brief-in-chief in the appeal. Turner decided not to proceed *pro se*, and his new brief-in-chief was filed by appellate counsel on July 24, 1998. The State's brief was filed on September 3, 1998, and Turner's reply brief was filed on September 17, 1998.

84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). The decision must be affirmed if it is supported by substantial evidence, even if there is evidence in support of a contrary determination. *See* ***Von Arx v. Schwarz***, 185 Wis.2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). Substantial evidence is defined as "'evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'" ***Id.***

The parole board "'is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious.'" ***Johnson***, 50 Wis.2d at 550, 185 N.W.2d at 311. An agency's decision cannot be found to be arbitrary or capricious if it has a rational basis, is "'founded upon proper legal standards,'" and depends upon "'facts that are of record or that are reasonably derived by inference from the record.'" ***Van Ermen***, 84 Wis.2d at 64-65, 267 N.W.2d at 20-21.

Violation of any condition of parole constitutes sufficient grounds for parole revocation. *See* ***State ex rel. Cutler v.Schmidt***, 73 Wis.2d 620, 622, 244 N.W.2d 230, 231 (1976). Turner admitted to the alleged violations of parole conditions. As the trial court noted, these violations occurred while Turner was "already on an alternative to revocation for using alcohol, failing to attend treatment and failing to report to work." The State asserts that Turner has failed to meet his burden of proof in challenging the decision to revoke his parole. We agree.

The determination of the amount of good time to be forfeited is within administrative discretion. *See* ***State ex rel. Hake v. Burke***, 21 Wis.2d 405, 410, 124 N.W.2d 457, 459 (1963). Our supreme court has said that this

discretionary determination necessitates a prediction of "what balance of time between renewed incarceration and further parole supervision is most likely to protect society and [concurrently] facilitate the violator's transition between prison and unconditional freedom." ***State ex rel. Hauser v. Carballo***, 82 Wis.2d 51, 74-75, 261 N.W.2d 133, 144 (1978). Factors which might be considered include:

> the prisoner's record, his attitude, his capacity for rehabilitation, the nature of his original crime, the nature of the violator's behavior while on parole, the nature of the violation of the conditions of parole, the rehabilitative aims to be accomplished by imprisonment or parole for the time periods in question, the need for forfeiture of good time to emphasize the seriousness of the violation of the condition of parole, and the time left before the mandatory release parole violator's final discharge or the discretionary parole violator's mandatory release parole date. The precise bounds of the period of recommitment … must depend upon the facts and circumstances of each case.

Id. at 75, 261 N.W.2d at 144-45.

Turner's revocation summary specifically indicated the factors considered and the department standards and administrative rules relied upon in formulating the reincarceration and good time forfeiture recommendations. These recommendations were made following consultation among three people who supervise the parole process, and were based upon the applicable provisions of § 10.03 of the operations manual of the Department's Division of Community Corrections and WIS. ADM. CODE § DOC 331.13(3)(b).

Turner's forfeiture of twelve years' good time was based upon the recommendation contained in the revocation summary. That recommendation included references to Turner's original offense of first-degree murder, his consistent usage of cocaine and alcohol, and the assault of his elderly wife. The revocation summary specifically noted that the recommendation was based on the

original offense's nature and severity, Turner's "abhorrent" behavior and conduct as a parolee, and the recommended forfeiture's status as "consistent with the goals and objectives of field supervision under Chapter DOC - 328," all factors which are outlined in WIS. ADM. CODE § DOC 331.13(3)(b). The summary also noted that "[t]he amount recommended as a forfeiture is clearly necessary to protect the public from the client's further criminal activity, to prevent depreciation of the seriousness of the violations, and gives ample opportunity in terms of time to provide a confined correctional treatment setting which the client needs." Accordingly, we conclude substantial evidence supports the forfeiture decision.

We turn now to Turner's claim that RULE 809.32, STATS., violates his right to equal protection under the law and is therefore unconstitutional as it applies to a defendant with an appointed attorney who files an appeal on his behalf. He contends that if RULE 809.32 is "found to be constitutional, a conscientious defense attorney who is faced with a client who wants to raise additional issues will be forced to advise the client to choose between his fundamental right to counsel and his fundamental right to access to the courts."[2] He argues, therefore, that RULE 809.32 violates his right to equal protection by providing him with less access to the courts than that of "an indigent defendant whose attorney files a no merit brief."

When a statute is challenged as being violative of a defendant's right to equal protection, it must be determined whether there are "reasonable and

[2] A criminal defendant's fundamental right to counsel is guaranteed by amendments to our federal and state constitutions. *See* ***State v. Wilson***, 179 Wis.2d 660, 680, 508 N.W.2d 44, 52 (Ct. App. 1993). Access to the courts also has been found to be a fundamental right. *See* ***State v. Martin***, 191 Wis.2d 646, 652, 530 N.W.2d 420, 423 (Ct. App. 1995).

practical grounds for the classifications drawn by the legislature." ***Reginald D. v. State***, 193 Wis.2d 299, 309, 533 N.W.2d 181, 185 (1995).

> A legislative classification is presumed to be valid. The burden of proof is upon the challenging party to establish the invalidity of a statutory classification. Any reasonable basis for the classification will validate the statute. Equal protection of the law is denied only where the legislature has made irrational or arbitrary classification. The tests to be applied in determining whether there has been a reasonable legislative classification in this state are fivefold: (1) All classification must be based upon substantial distinctions; (2) the classification must be germane to the purpose of the law; (3) the classification must not be based on existing circumstances only; (4) the law must apply equally to each member of the class; and (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation. The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification.

Omernik v. State, 64 Wis.2d 6, 18-19, 218 N.W.2d 734, 741-42 (1974) (footnotes omitted). When the "legislative scheme does not affect a fundamental right and is not based on a suspect classification," we must find the statute constitutional unless it is not "rationally related to a legitimate governmental interest." ***Georgina G. v. Terry M.***, 184 Wis.2d 492, 518, 516 N.W.2d 678, 686 (1994).

The State contends that Turner "has not claimed that the challenged statute establishes a suspect classification, but, rather, that it involves fundamental rights." Turner, however, states that "the suspect classes created by sec. 809.32, STATS., are apparent on the face of the statute and, therefore, this is a challenge to the face of the statute." Turner goes on to say that the statute "creates two classes of indigent defendants: (1) Those whose attorneys file a no-merit report; and, (2) Those whose attorneys file an appeal." Turner claims:

> Under the statute, the second class of defendants, those whose attorneys file an appeal, have their fundamental rights affected in two ways. Firstly, whereas the first class of defendants have some assurance that their attorney was diligent in examining the record (because the attorney so certified in the no merit report); the second class of defendants knows only that the attorney identified at least one issue for appeal. Secondly, whereas the first class of defendants is then given access to the Court of Appeals by allowing them to file their own brief arguing the issues identified by counsel and raising any additional issue; the second class of defendants has no similar access to the Court of Appeals to raise additional issues….
>
> There is no reason, compelling or otherwise, for creating these two classes of indigent defendants. Thus, unless [I am] permitted to proceed *pro se*[,] sec. 809.32, STATS., is unconstitutional beyond a reasonable doubt.

No "federal constitutional right to counsel beyond first appeals of right" exists and our supreme court, on petitions for review "based on independent state constitutional grounds," has declined to find such a right. *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis.2d 246, 252-53, 548 N.W.2d 45, 47 (1996). The State argues that this court's refusal to accept Turner's *pro se* brief, "in which he wishes to present an issue his appointed appellate counsel considers to be frivolous and of no arguable merit," has not effected a violation of Turner's constitutional right to equal protection "[s]ince no-merit reports are not constitutionally required in this proceeding." The State claims that Turner has no "constitutional right to counsel for his appeal from the denial of his petition for a writ of certiorari to review his parole revocation," and contends, "[t]herefore, the statute [RULE 809.32, STATS.], insofar as it treats differently two classes of indigents, must be viewed in terms of whether it is rationally related to a legitimate governmental interest."

Our supreme court has noted that other jurisdictions "have concluded that a defendant represented by counsel [on appeal] has no right to

supplement counsel's brief with a pro se brief." ***State v. Debra A.E.***, 188 Wis.2d 111, 137, 523 N.W.2d 727, 736-37 (1994). In Wisconsin, there is no constitutional right to hybrid dual representation on appeal, but "a court is not precluded from exercising its discretion to accept and consider" the *pro se* brief of an appellant who is represented by counsel. ***Id.*** at 138, 523 N.W.2d at 737.

Turner argues that "[b]ased upon the court's list of reasons [in ***Debra A.E.***] for not finding a constitutional right to hybrid representation there seems to be a conceptual difference between a defendant wanting to address legal issues already raised and briefed by counsel; and a defendant wanting to raise *additional issues*." The State contends that the supreme court's rationale applies "equally forcefully to the procedural posture of the two classes of indigent defendants affected by the terms of sec. 809.32, as postulated by the petitioner." Because we agree with the State's contentions, we conclude that the classifications created by RULE 809.32, STATS., are not arbitrary or irrational and that there is a reasonable basis to justify them. We hold, therefore, that the statute does not violate any of Turner's fundamental rights and is constitutionally valid.[3]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] See ***State v. Mosley***, 102 Wis.2d 636, 307 N.W.2d 200 (1981), and ***McCoy v. Court of Appeals***, 486 U.S. 429 (1988), holding that RULE 809.32, STATS., is constitutional. Additionally, as the State notes, persons in Turner's circumstances who choose to permit counsel to represent them on appeal retain a potential remedy for an improper failure of counsel to pursue an issue. Under ***State v. Debra A.E.***, 188 Wis.2d 111, 138, 523 N.W.2d 727, 737 (1994), they may "seek relief on the grounds of ineffective assistance of appellate counsel."

FINE, J. *(concurring).* Although I agree that the trial court's order should be affirmed, I write separately to address Turner's equal protection argument. As noted by the majority, this court has discretion to accept and consider a *pro se* brief of an appellant who is represented by counsel. *See* ***State v. Debra A.E.***, 188 Wis.2d 111, 138, 523 N.W.2d 727, 737 (1994). RULE 809.32, STATS., does not prevent this court from exercising that discretion to consider such a *pro se* brief.[4] Thus, RULE 809.32 does not deny Turner of a right enjoyed by indigent defendants whose attorneys file no-merit reports. Indeed, if we were to find RULE 809.32 unconstitutional on equal protection grounds, we still would not be obligated to accept Turner's *pro se* brief in addition to the brief filed by counsel. Turner's rights are limited by controlling case law, not by RULE 809.32. *See* ***Debra A.E.***, 188 Wis.2d at 137, 523 N.W.2d at 736–737 ("a defendant represented by counsel has no right to supplement counsel's brief with a pro se brief").

Turner's equal protection argument also fails because defendants whose attorneys identify and advance viable appellate issues and defendants

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[4] RULE 809.32, STATS., provides, in relevant part:

> **Rule (No merit reports). (1)** If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service.

whose attorneys file no-merit reports after determining that an appeal would be frivolous are not similarly situated. "To attack a statute on grounds that it denies equal protection of the law, a party must show that the statute unconstitutionally treats members of similarly situated classes differently." ***Tomczak v. Bailey***, 218 Wis.2d 245, 261, 578 N.W.2d 166, 173 (1998); *see also* ***State v. Post***, 197 Wis.2d 279, 318, 541 N.W.2d 115, 128–129 (1995). Significantly, an appellate court reviews a no-merit report and the defendant's response to that report not to determine whether the defendant is entitled to relief, as with an appellate brief, but to determine whether there is an issue of arguable merit that should be addressed by an appellate brief. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 439 n.13 (1988) ("[T]he function of the [no-merit] brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court."); ***Anders v. California***, 386 U.S. 738, 744 (1967) (if an appellate court finds that an issue identified in a no-merit report has arguable merit, the court must, prior to decision, afford the defendant the assistance of counsel to argue the appeal). If we determine that an appellate brief is necessary, any defendant may either file the brief through an attorney or proceed *pro se*.