COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2906

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

STATE EX REL. KENNETH JORDAN,

PETITIONER-APPELLANT,

V.

STEPHEN M. PUCKETT AND MOLLY SULLIVAN OLSON,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Kenneth Jordan, an inmate serving a life sentence, has appealed from a trial court order denying a petition for a writ of certiorari. In the petition Jordan sought review of the denial of his request to be assigned a minimum security classification by the Program Review Committee (PRC). We affirm the trial court's order.

A security classification decision is reviewable by certiorari. *See* ***State ex rel. Richards v. Traut***, 145 Wis.2d 677, 678, 429 N.W.2d 81, 81 (Ct. App. 1988). Judicial review in a certiorari matter is limited to four questions: (1) whether the PRC kept within its jurisdiction; (2) whether the PRC acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that it might reasonably make the decision it did. *See* ***id.*** at 679-80, 429 N.W.2d at 82.

Jordan argues that the PRC's sole reason for denying his request for a minimum security classification was because the Parole Commission did not endorse a transfer to minimum security. He correctly points out that the Parole Commission's failure to endorse the change in his classification was cited by both the PRC in its decision of December 18, 1996, and by respondent Molly Sullivan Olson in her decision of February 18, 1997, affirming the PRC decision.

Jordan contends that by considering the Parole Commission's failure to endorse a change to a minimum security placement, the PRC failed to comply with its own rules and thus failed to act according to law. Specifically, Jordan contends that WIS. ADM. CODE § DOC 302.14 sets forth all factors which may be considered by the PRC in denying a reduction in a security classification. He contends that because the endorsement of the Parole Commission is not one of the listed factors, it may not be considered by the PRC. He further contends that to the extent that rules enacted after his conviction permit consideration of the Parole Commission's endorsement, they violate the ex post facto clauses of the state and federal constitutions by depriving him of a minimum security classification for

which he alleges he would have qualified under the rules in effect at the time of his conviction.

We reject Jordan's argument that the PRC was not entitled to consider the endorsement of the Parole Commission. WISCONSIN ADM. CODE § DOC 302.14, the rule currently applicable to the security classification of inmates, provides that the factors enumerated in it "*may be* taken into consideration in assigning a security classification to an inmate." (Emphasis added.) These same factors were enumerated in WIS. ADM. CODE § HSS 302.14 (1979), the provisions in effect at the time of Jordan's conviction. However, unlike the current WIS. ADM. CODE § DOC 302.14, the former rule provided that the criteria for assigning a security classification "shall include only the following." *See* WIS. ADM. CODE § HSS 302.14 (1979).

When contrasted with the language of the former rule, the language of the current rule clearly establishes that the PRC is entitled to consider not only the factors enumerated in WIS. ADM. CODE § DOC 302.14, but also other relevant factors that bear upon the question of security classification. Because it is reasonable for the PRC to refrain from placing an inmate in a minimum security classification until consistent with parole planning by the Parole Commission, the input of the Parole Commission is a reasonable and relevant factor for the PRC to consider and justified the denial of a reduction in security classification to Jordan.

We have also considered Jordan's argument that the PRC's application of current rules for security classification rather than the rules in effect at the time of his conviction constitutes a violation of the constitutional prohibition on ex post facto laws. However, both state and federal courts in Wisconsin have previously rejected claims that changes in the rules applicable to the PRC's

determination of security classifications constitute ex post facto laws. *See* ***Payton v. Fiedler***, 860 F. Supp. 606, 608 (E.D. Wis. 1994); ***Burrus v. Goodrich***, 194 Wis.2d 654, 660, 535 N.W.2d 85, 86 (Ct. App. 1995). The federal court has specifically held that the application of WIS. ADM. CODE § DOC 302.14 to an inmate who was convicted prior to adoption of the current rule did not constitute an ex post facto law, despite that inmate's claim that he was treated more leniently under the former rule. *See* ***Payton***, 860 F. Supp. at 608.

By the Court.—Order affirmed.

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