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September 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1907

State of Wisconsin ex rel. Nathan Gillis v. William Pollard
(L.C. # 2012CV468)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Nathan Gillis, pro se, appeals an order denying his petition for a writ of habeas corpus. He argues that prison disciplinary actions brought against him were retaliatory, and his mandatory release date was improperly extended while he was still in segregation status. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21.¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Gillis was convicted of various offenses in 1993.² He was sentenced to prison on certain counts, and the court withheld sentences and placed Gillis on concurrent probation on two other counts. Gillis's probation on one count was revoked in 2006. Gillis was sentenced after revocation to an indeterminate sentence of twelve years of imprisonment.

While in prison, Gillis was found guilty of several disciplinary offenses that resulted in the imposition of discipline and the extension of his mandatory release date.³ On July 12, 2012, Gillis filed a petition for a writ of habeas corpus. He alleged: (1) the extensions of his

² Gillis was convicted in 1993 of one count of kidnapping (count one), two counts of second-degree sexual assault (counts two and three), one count of first-degree recklessly endangering safety (count four), and one count of false imprisonment (count five). He was sentenced to consecutive terms of five years' imprisonment on counts two and three and to a consecutive two-year term on count four. On counts one and five, the court withheld sentencing and placed Gillis on concurrent probationary terms of twenty years on count one and six years on count five, to be served concurrent with the prison sentences.

³ On July 10, 2006, Gillis was found guilty of disobeying orders and received discipline of three days in adjustment segregation. A "Notification of Sentence Data" form prepared on July 20, 2006, determined that Gillis's mandatory release date was extended one day as a result of serving those three days of segregation.

On April 27, 2009, Gillis was found guilty of lying about prison staff and received discipline of 240 days in program segregation. Gillis appealed the decision to the warden, who affirmed the decision and sentence. A notification form prepared on June 24, 2009, determined that Gillis's mandatory release date was extended by twenty-nine days because Gillis had served fifty-eight days in segregation. A notification form prepared on July 27, 2009, determined that Gillis's mandatory release date was extended by another sixteen days because Gillis had served an additional thirty-eight days in segregation. A notification form prepared on August 21, 2009, determined that Gillis's mandatory release date was extended by twelve additional days because Gillis had served another twenty-five days in segregation.

On January 22, 2010, Gillis was found guilty of lying about prison staff and engaging in disruptive conduct, for which he received discipline of 240 days in program segregation. Gillis appealed to the warden, who affirmed the decision and sentence on March 9, 2010. A notification form prepared on April 12, 2010 determined that Gillis's mandatory release date was extended by forty days because Gillis had served eighty days in segregation. A notification form prepared on May 18, 2010, determined that Gillis's mandatory release date was extended by seventeen more days after Gillis had served an additional thirty-four days in segregation. A notification form prepared on July 15, 2010, determined that Gillis's mandatory release date was further extended by thirty days after Gillis had served sixty more days in segregation. A notification form prepared on September 20, 2010, determined that Gillis's mandatory release date was extended by an additional thirty-three days because Gillis had served sixty-six more days in segregation.

mandatory release date violated due process; (2) under WIS. ADMIN. CODE § DOC 303.84 (Dec. 2006),⁴ the Wisconsin Department of Corrections “can not take good time while a prisoner is doing program segregation;” and (3) the conduct reports were “written in retaliation” and “violate equal protection rights.”

In a written decision, the circuit court denied Gillis’s petition. The court stated that if the petition had been based “solely on the Petitioner’s complaint of DOC’s decision to impose a penalty for a violation of rules of conduct,” it would quash the writ because Gillis’s remedy was to seek review of the disciplinary decisions by writ of certiorari. The court therefore held that “[a]ny claim related to the legality of the underlying punishment for violation of the rules of conduct [is] not appropriately addressed in this writ of habeas corpus, and will not be considered.” The court also held that Gillis’s challenge to the extension of his mandatory release date lacked merit. The court stated:

In this case, every Notification of Sentence Data sheet attached to Petitioner’s petition shows a date when the sheet was prepared (in the upper right hand of the page) that is after any time spent in segregation. The Petitioner had served the segregation time before any reduction was made in his mandatory release. Therefore, the Petitioner’s argument has no merit.

On appeal, Gillis insists that the prison disciplinary actions against him were brought in retaliation for engaging in protected activities. However, this claim is not properly before us. As the circuit court correctly observed, Gillis did not seek timely certiorari review within forty-five days of the disciplinary decisions. *See* WIS. STAT. § 893.735; *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶10, 244 Wis. 2d 177, 629 N.W.2d 17. The cause of action

⁴ All references to the Wisconsin Administrative Code are to the December 2006 version.

accrues on the date of the decision, unless the prisoner proves that he or she received notice of the decision at a later date. *Id.* Absent evidence in the record to the contrary, the court will assume that the prisoner received the decision on the date it was issued. *See id.*, ¶11.

The last of the disciplinary decisions was affirmed by the warden on March 9, 2010. Even if Gillis's habeas petition was construed as a petition for certiorari review, he did not file it until July 10, 2012, long after the forty-five days for seeking certiorari review had passed. The circuit court properly found that Gillis did not seek timely certiorari review and did not provide a valid reason for failing to do so. Accordingly, the circuit court properly refused to consider the claims.

Moreover, Gillis's mandatory release date was extended as required by WIS. STAT. § 302.11(2)(b), by the "number of days equal to 50% of the number of days" that he "spent in segregation status."⁵ Gillis does not argue that DOC wrongly calculated the number of days that he spent in segregation status that are subject to the mandatory release date extension provision of § 302.11(2)(b). Nor does he argue that DOC wrongly determined the number of days by which his mandatory release date has been extended pursuant to that statute. Rather, his argument is limited to the timing of those determinations. He contends that DOC violated WIS. ADMIN. CODE § DOC 303.84 by making those calculations while he was still in segregation status rather than waiting until he was released from segregation.

⁵ Gillis committed his offenses in 1993. The language of WIS. STAT. § 302.11(2) in the current version of the statutes is the same as that in the 1993-94 version.

However, nowhere in the text of WIS. ADMIN. CODE § DOC 303.84 is there any requirement that DOC calculate the mandatory release extension at any particular time. Gillis relies on a note found in the appendix to WIS. ADMIN. CODE ch. 303, which states, “[t]his number must be calculated when the inmate is released from segregation, since the inmate may not spend the full amount of time in segregation to which he or she was sentenced.” See WIS. ADMIN. CODE ch. DOC 303 app., note: DOC 303.84.

A court may look to the administrative code’s appendix as an aid in interpreting an ambiguous rule, but the appendix is not part of the rule. See *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 495, 402 N.W.2d 369 (Ct. App. 1987). Moreover, the language of WIS. ADMIN. CODE § DOC 303.84(2) is not ambiguous.

In any event, the note in the appendix states that the reason the extended mandatory release date should be calculated at the end of the segregation time is that an inmate may not actually serve all of the time in segregation to which he or she was sentenced. The court correctly found, and Gillis does not contest, that every time DOC extended his mandatory release date, it did so based on segregation time he had already served. DOC properly extended Gillis’s mandatory release date at a rate of one day for every two days he spent in adjustment or program segregation, as required by WIS. STAT. § 302.11(2)(b). The circuit court properly denied Gillis’s petition for a writ of habeas corpus.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE
809.21.

Diane M. Fremgen
Clerk of Court of Appeals