

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-056

NOVEMBER TERM, 2008

George Dunbar	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Robert Hofmann, Commissioner of Department of Corrections	}	DOCKET NO. 385-5-07 Wncv
	}	Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff inmate appeals the superior court's order granting the State's motion for summary judgment with respect to plaintiff's complaint under Vermont Rule of Civil Procedure 75. We affirm.

In May 2007, plaintiff filed with the superior court a complaint for review of governmental action under Rule 75, contending that he had been unlawfully terminated from a prison program for refusing to admit to statements contained in a police affidavit describing conduct that had led to his conviction for simple assault. Plaintiff had been sentenced as a habitual offender to a term of imprisonment of ten years to life. At the same time, he received a concurrent zero-to-one-year sentence for the simple assault conviction, which had been pled down from an aggravated sexual assault charge.

The Department of Corrections assessed plaintiff as needing to participate in the Cognitive Self-Change (CSC) program. Plaintiff declined to participate in the program until the fall of 2005, a few months after his original minimum release date had passed. Shortly after beginning the program, plaintiff refused to take responsibility for some of the conduct alleged in the police affidavit concerning his simple assault conviction. He took the position that the allegations of sexual misconduct contained in the affidavit were not true, and that he did not have to admit to them because, pursuant to his plea agreement, he was convicted of simple assault, not sexual assault. On this basis, plaintiff filed a grievance, which was denied by Department personnel and finally the Commissioner in November 2005. Apparently, he filed another grievance in 2006 based on the same arguments.

Approximately eighteen months later, plaintiff filed the instant action, making essentially the same claims as in his previous grievances, except that he also alleged that the Department's conduct in wrongfully terminating him from the CSC program violated his right to due process. In September 2007, while his Rule 75 action was pending, plaintiff filed a petition for post-conviction relief (PCR), which, among other things, challenged the Department's use of factual

allegations from the police affidavit for programming purposes. In November 2007, the parties in the PCR action, including plaintiff and his counsel, entered into a stipulation limiting the factual basis of his simple assault conviction to nonsexual allegations. Further, the Department agreed to use only the stipulated factual basis of that conviction for programming purposes. As the result of the stipulation, plaintiff was free to participate in the CSC program and would not be required to admit to allegations of sexual misconduct.

Shortly thereafter, the State filed a motion for summary judgment in the Rule 75 action. Plaintiff, who was represented by counsel, did not oppose the motion. On January 30, 2008, the superior court granted the State's motion, ruling that plaintiff's Rule 75 action (1) was untimely because it was not filed within six months of the denial of his original grievance concerning his termination from the CSC program, and (2) was moot insofar as plaintiff had achieved through the stipulation in the PCR action whatever relief might be available to him in his Rule 75 action. Plaintiff now files a pro se appeal from that ruling, arguing that his Rule 75 action was neither untimely nor moot. We need not consider whether the action was timely filed because we conclude, as an initial matter, that it became moot upon the court's acceptance of the parties' stipulation in the PCR action.

Plaintiff suggests that the Rule 75 action is not moot because he is entitled to credit for the months of programming he missed as the result of the Department's unlawful conduct. We disagree. Plaintiff cannot be given credit for completing programming that he did not complete. The program is aimed at helping prisoners and protecting the public by increasing the likelihood that prisoners will be able to integrate themselves into the community upon their release and not reoffend. Even if we assume that the plaintiff was wrongfully terminated from the CSC program—an issue which has not been determined and which we need not decide—the most plaintiff could obtain from a decision on the merits in his Rule 75 action would be the right to re-enter the program, which is precisely what he obtained from the stipulation in the PCR action. Plaintiff is now able to participate in the CSC program without being required to admit to factual allegations of sexual misconduct. As the trial court concluded, there is no other relief that can be provided for his Rule 75 complaint. Accordingly, the superior court correctly dismissed the action as moot. See *In re P.S.*, 167 Vt. 63, 67 (1997) (stating “that a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome” (quotation omitted)).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice