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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-031

MAY TERM, 2002

Jeffrey Stillings v. John Gorczyk	}	APPEALED FROM: Caledonia Superior Court DOCKET NOS. 190-7-00 Cacv & 132-5-00 Cacv Trial Judge: Mark J. Keller

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

Plaintiff Jeffrey Stillings appeals a summary judgment ruling dismissing his V.R.C.P. 75 complaint against the Commissioner of the Vermont Department of Corrections ("DOC"). We affirm.

In January 1997, plaintiff was convicted of lewd and lascivious conduct, stalking, retail theft, and six counts of violating conditions of release. The court sentenced him to prison for two to five years and zero to two years on the lewd and lascivious and stalking convictions respectively, and zero to six months each on the retail theft and violating conditions of release convictions. The court directed the sentences to run consecutively, making plaintiff's effective term of imprisonment two to eleven years. Plaintiff was later convicted of two additional counts of violating conditions of release. On those convictions, the court sentenced plaintiff to serve zero to six months each, concurrent with each other, but consecutive to plaintiff's prior convictions.

Upon his incarceration, DOC classified plaintiff as a sexual offender and directed him to undergo treatment in the Vermont Treatment Program for Sex Aggressors ("VTPSA"). The DOC treatment team determined that plaintiff's participation in VTPSA should not begin until after his successful completion of DOC's Cognitive Self Change Program, and no sooner than three years before his maximum release date due to his high risk to reoffend even with specialized treatment.

In June 1998, plaintiff sought review in superior court, pursuant to V.R.C.P. 75, of DOC's inmate classification scheme as applied to him. Plaintiff disagreed with DOC's decision to classify him as a sex offender during his entire incarceration where only one of the several crimes for which he was convicted was a sex offense. Plaintiff claimed that DOC must reclassify an inmate when the sentence giving rise to the classification expires. In other words, DOC may not use a prior expired sentence as a basis for an inmate's present classification; only the current sentence the inmate is serving may provide the basis for an appropriate classification according to plaintiff. DOC's policy, plaintiff claimed, allowed it to delay plaintiff's treatment in the VTPSA program, making plaintiff ineligible for early parole and ensuring that he will serve his maximum sentence. Plaintiff's complaint also alleged that DOC's policies and procedures on classification were invalid because they were not promulgated in accordance with the Vermont Administrative Procedures Act.

DOC later moved for summary judgment, which the trial court granted. The court construed plaintiff's complaint as raising a single argument, namely that the Commissioner of DOC cannot require him to participate in VTPSA as a condition for a favorable parole recommendation because he had already completed the sentence for his conviction for lewd and lascivious conduct. The court properly acknowledged the broad discretion DOC has in classifying inmates and treating their needs, and found no genuine issue of material fact existed that DOC did not abuse its discretion in

establishing the classification scheme. The court did not directly address plaintiff's claim that the classification scheme must be promulgated in accordance with the Administrative Procedures Act, although plaintiff raised the issue in multiple filings, including a motion for a declaratory ruling that the policy at issue was not properly promulgated. Dissatisfied with the court's summary judgment order, plaintiff filed various post-judgment motions. On October 2, 2000, the court entered an order on plaintiff's post-judgment motions which stated that it had addressed all of plaintiff's issues in the prior summary judgment order. Plaintiff thereafter filed another request asking the court to rule on his motions. The court entered an order noting that it ruled on plaintiff's outstanding motions in the summary order of October 2, 2000. On December 13, 2001, the court entered final judgment for DOC. Plaintiff timely appealed.

On appeal, we use the same summary judgment standard as the trial court. Ross v. Times Mirror, Inc., 164 Vt. 13, 17 (1995). Summary judgment is proper if no genuine issue of material fact exists and any party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). Plaintiff, the party opposing summary judgment, may not rest solely on the allegations in his pleadings, but must come forward with some evidence to counter the movant's affidavits to establish the necessity of a trial. See Ross, 164 Vt. at 18; V.R.C.P. 56(e). Our review of this matter is also controlled by the standard we employ when reviewing administrative action by DOC under Rule 75. In cases involving inmate classification and treatment, we will not interfere with DOC's determinations absent a showing that DOC clearly and arbitrarily abused its authority. See Vermont State Employees' Ass'n, Inc. v. Vermont Criminal Justice Training Council, 167 Vt. 191, 195 (1997) (Rule 75 review in the nature of mandamus involves a limited standard of review to determine whether the agency clearly and arbitrarily abused its authority).

At the outset, we note that plaintiff, who appears here pro se, filed a brief with a scattershot of arguments, some of which are nearly incomprehensible. We will address only those arguments readily discernible from plaintiff's filing. See Persons v. Lehoe, 150 Vt. 582, 587 (1988) (Court will not address arguments inadequately briefed).

Plaintiff first challenges as arbitrary and capricious DOC's policy not to reclassify him according to his "current" sentence, but instead on his sentence for the sex offense which he claims has expired. Plaintiff essentially challenges DOC's reclassification policy. That policy sets forth a time frame for regular reclassification assessments and a methodology for determining whether an inmate should be reclassified. See Vt. Dep't of Corrections Offender Classification Manual § 4, at 70-80. The policy requires DOC to complete a reclassification form which scores an inmate on nine criteria. Id. at 79. The total score derived from the completed form serves as the basis for DOC's reclassification decision. Id. Criterion three rates the severity of the inmate's "current offense." Id. at 74a. The policy defines the "current offense" as the offense "described in the Initial Classification Instrument," with one exception not relevant here. Id. The portion of the policy plaintiff challenges states:

On occasion, sentences will expire and inmates will continue to serve time on another existing sentence. When [th]is situation occurs, reclassification regarding recomputation of the custody instrument will not occur. The status of prior conviction(s) is affected if and when the inmate leaves and re-enters the system under a new sentence or violation (parole/probation).

Id. (emphasis in original). We understand this provision to mean that the "severity of offense" number used on the reclassification form for inmates like plaintiff who are serving consecutive sentences will always correspond to the severity listed on the initial classification form.

Plaintiff alleges that the above policy is arbitrary and capricious because each sentence comprising his total effective sentence will expire, and thus DOC should reclassify him according to the unexpired sentences only. He posits that he has already served his time on the sex offense and therefore DOC ought to reclassify him accordingly. We find no support in the law or the record for plaintiff's theory. As DOC points out, its policy is consistent with 13 V.S.A. § 7032, which requires the DOC to aggregate the minimum and maximum terms of an inmate's consecutive sentences for computation purposes. 13 V.S.A. § 7032(c)(2); St. Gelais v. Walton, 150 Vt. 245, 248 (1988). Further, the Legislature has committed to DOC's discretion the responsibility for classifying inmates and developing treatment programs for them. 28 V.S.A. § 102(c)(1), (3), (8). How to classify prisoners is a question "peculiarly within the province and professional expertise of prison officials." Parker v. Gorczyk, 170 Vt. 263, 277 (1999). Even if we could agree with plaintiff that his consecutive sentences have an order in which they are served, it is within DOC's discretion to refrain from reclassifying a prisoner serving consecutive sentences for a variety of crimes after any one of the sentences has

"expired" but the prisoner remains incarcerated. We find no clear abuse of DOC's authority in classifying plaintiff as a sex offender during his entire effective sentence.

Plaintiff next alleges that DOC arbitrarily and unconstitutionally decided to delay his participation in the VTPSA program because he cannot qualify for early release or parole as a result. We first observe that plaintiff does not coherently explain how DOC's decision affects his ability to gain early release or parole. Even assuming plaintiff's allegation is correct, his argument is unavailing. Inmates have no constitutionally protected interest in participating in programs allowing them to earn discretionary "good time" credits to reduce their effective sentences. See Conway v. Gorczyk, 171 Vt. 374, 379 (2000) (inmate has no protected liberty interest in participating in prison program which would qualify inmate for "good time" credits); cf. Parker v. Gorczyk, 170 Vt. at 276 (no protected liberty interest in individual assessment for furlough); Conway v. Cumming, 161 Vt. 113, 117 (1993) (no constitutionally protected interest in furlough status exists). In light of that precedent, we cannot conclude that plaintiff has a constitutionally protected interest in starting the VTPSA treatment earlier than prison officials have determined is appropriate for him. The record, which is uncontroverted by any opposing affidavits or evidence, shows that DOC has delayed plaintiff's treatment in VTPSA to maximize its effectiveness due to plaintiff's particular circumstances. Moreover, constitutional principles do not require DOC to relieve plaintiff from having to serve his entire term of incarceration. See Conway v. Gorczyk, 171 Vt. at 379. Plaintiff has not shown an abuse of DOC authority warranting judicial relief.

The next two challenges to DOC's decision to delay plaintiff's participation in VTPSA center on an assessment tool he claims DOC used to make that determination. Plaintiff first asserts that the assessment tool is "brimming with inconsistencies and errors." He contends that if the assessment were accurate, DOC would have reached a different decision regarding his programming, including placing him in early release programs. He also asserts that he was denied access through discovery to the assessment document thereby impairing his ability to litigate his claims in this action.

As to plaintiff's first contention, we note that he has offered no affidavits or other evidence to support his bare allegations that DOC's decision regarding his treatment through VTPSA would have been different. See V.R.C.P. 56(e) (opponent to summary judgment motion may not rest on allegations and denials in that party's pleadings where motion is supported by sworn affidavits and other evidence). Moreover, he fails to identify the inconsistencies and errors appearing in the assessment, with the exception of one incident from his past he claims the assessor described inaccurately. Accepting as true plaintiff's claim that the incident was erroneously recounted in the assessment, plaintiff has not presented any evidence to show how an accurate account would have made a difference in DOC's ultimate decision regarding his participation in VTPSA. As we explained previously, plaintiff cannot rest on his bare allegations to withstand summary judgment. V.R.C.P. 56(e). Finally, plaintiff has not pointed to any evidence demonstrating how the assessment factored into DOC's decision on plaintiff's treatment needs. DOC presented an uncontested affidavit of plaintiff's case worker who testified that DOC's decision was based on plaintiff's "multiple sexual offense charges and conviction, his poor community supervision history and his classification as a psychopath." Plaintiff did not establish the existence of any genuine issue of material fact warranting further inquiry into the assessment as it related to DOC's decision. Summary judgment was therefore proper.

For the same reason, the court did not err in granting summary judgment before DOC responded to plaintiff's request to produce the entire assessment document, which plaintiff concedes he reviewed previously. In addition, plaintiff's various pleadings make it apparent that he sought the document to prove that DOC should have allowed him to participate in the VTPSA program earlier so that he could earn good time credits. As we explained above, he has no absolute right to participate in programs that might enable him to earn good time credits. Parker v. Gorczyk, 171 Vt. at 379. Summary judgment was proper under the circumstances.

Plaintiff also challenges DOC's decision not to award him good time credits under 28 V.S.A. § 811(c) while he awaits entrance into the VTPSA program. Whether to award plaintiff such credits is a discretionary decision left to DOC. 28 V.S.A. § 811(b); Conway v. Gorczyk, 171 Vt. at 379. Thus, even if plaintiff entered VTPSA immediately upon his incarceration, and assuming he successfully completed the program, DOC could still decline to award him good time credits under the statute. Conway v. Gorczyk, 171 Vt. at 379. Consequently, plaintiff has not shown a clear abuse of authority in DOC's decision.

Plaintiff's last claim on appeal concerns DOC's reclassification policy. Plaintiff claims DOC did not lawfully promulgate

the policy using the procedures set forth in the Vermont Administrative Procedures Act ("APA"). See 3 V.S.A. §§ 836-843 (setting forth procedure for promulgating administrative rules). Plaintiff correctly notes that we recently held that DOC like other state agencies must follow APA procedures when promulgating policies of general applicability, including inmate classification policies. Parker v. Gorczyk, ___ Vt. ___, ___, 787 A.2d 494, 498-99 (2001) (mem.). Because the trial court did not address this issue directly, we cannot say with certainty that DOC's reclassification policy is invalid under the APA. Nevertheless, even if DOC did not abide by the APA when it developed and implemented the reclassification policy, plaintiff is not entitled to the relief that he seeks, which includes release to furlough or community supervision, a favorable parole recommendation, and reclassification based on his "current" sentence which he contends is the sentence imposed for violations of conditions of release. The decision at the heart of plaintiff's complaint relates to the appropriate rehabilitation plan for plaintiff and the timing for its implementation and completion. The record demonstrates that DOC's decision regarding plaintiff's need for treatment in the VTPSA, and the delay of such treatment until he gets closer to his maximum release date, was not based on the reclassification policy, but was based on his sex offense and an individual assessment of plaintiff's particular circumstances. Plaintiff has not offered any affidavits or other evidence which would create a triable issue that the challenged policy is what led to his present circumstances. In the absence of a genuine issue for trial, summary judgment was proper.

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice