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IN THE COURT OF APPEALS OF INDIANA

HOWARD STEELE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1102-CR-157
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
The Honorable Stanley Kroh, Master Commissioner
Cause No. 49G03-9302-CF-18105

October 5, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Howard Steele appeals the post-conviction court's summary denial of his petition for education credit time for a high school diploma earned from an unaccredited school.

We reverse and remand.

ISSUE

> Whether the post-conviction court properly denied Steele's petition for an award of educational credit time.

FACTS

While incarcerated at the Wabash Valley Correctional Facility in Carlisle, Indiana, Steele enrolled in Liberty Christian Academy ("LCA"), a secondary institution located in Seymour, Indiana. At some point, Steele apparently presented a diploma and grade transcript from LCA to the Department of Correction ("DOC") but was denied any educational credit time. In a DOC October 26, 2009 Memorandum, Matt Leohr, Acting Supervisor of Classification, stated that he had reviewed Steele's request and attached information. Leohr further stated that "[t]he facility referred the issue to Mr. Nally, Director of Education for the [DOC]. He has reviewed the issue and has determined that the [DOC] will not recognize a GED or high school degree from [LCA]." (App. 78). On November 17, 2009, Steele filed a "Classification Appeal" of Leohr's determination. (App. 77). This appeal was denied on November 23, 2009.

On December 27, 2010, Steele, pro se, filed with the post-conviction court a "Petition for Additional Credit Time." On February 9, 2011, the post-conviction court determined that Steele's petition was "an action for post-conviction relief," and it summarily denied Steele's petition. In doing so, the post-conviction court made the following pertinent findings/conclusions:

> 3. Pursuant to *McGee v. State*, 790 N.E.2d 1067 (Ind. Ct. App. 2003), *trans.denied*, and Ind. Code 25-50-6-3.3, the high school from which the diploma is received must have standards as high as those in Indiana in order to authorize an award of credit time for a diploma.
>
> 4. [LCA] does not meet Indiana's standards because it is not accredited by the State of Indiana Department of Education.
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> 5. The [DOC] has not approved [LCA] for an award of educational credit time.
>
> 6. Petitioner is not entitled to credit time for his diploma from [LCA].

(App. 50).[1]

DECISION

Steele contends that the post-conviction court erred in denying his petition because Indiana Code section 35-50-6-3.3, not the DOC, sets the standards for credit time earned for a high school diploma. Steele further contends that a diploma from LCA qualifies as a "high school diploma" under the statute.

[1] The State concedes that Steele exhausted all administrative remedies.

The post-conviction court correctly determined that Steele's petition for additional credit time is treated as a petition for post-conviction relief. *Wilson v. State*, 785 N.E.2d 1152, 1153 (Ind. Ct. App. 2003). Post-conviction procedures do not afford the convicted an opportunity for a "super-appeal." *Wrinkles v. State*, 749 N.E.2d 1179, 1187 (Ind. 2001), *cert. denied*, 535 U.S. 1019, 122 S.Ct. 1610, 152 L.Ed.2d 624 (2002). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Id*. Petitioners must establish their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Wrinkles*, 749 N.E.2d at 1187. Therefore, the petitioner must convince the court on review that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*. at 1187-88. "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002).

Indiana Code section 35-50-6-3.3(a) provides, in pertinent part, that a person earns credit time if the person (1) is in credit Class 1; (2) has demonstrated a pattern consistent with rehabilitation; and (3) successfully completes requirements to obtain a high school

diploma.[2] The person may earn one year of credit time for graduation from high school. Ind. Code § 35-50-6-3.3(d).

In support of his request for credit time, Steele made the following pertinent allegations:

> 2. The Petitioner contends and asserts that he has earned his high school diploma through [LCA].
>
> * * *
>
> 5. The sole basis for the [DOC's] refusal is that "it was not approved."
>
> * * *
>
> 8. [LCA] is a non-accredited school in the state of Indiana; however, it meets the Indiana criteria and is recognized/accepted by post-secondary schools and the military.
>
> * * *
>
> 13. Since [LCA] meets the State's eligibility criteria, and the [DOC] has not presented a valid reason for not recognizing the Petitioner's diploma after allowing him to obtain it, this Court should specifically declare that [LCA] is an approved secondary school under Ind. Code § 35-50-6-3.3.

(App. 72-73).

As we stated in *McGee*, Indiana Code section 35-50-6-3.3 is unambiguous on the point that "a person is entitled to one year of credit time if he obtains 'a high school diploma.'" 790 N.E.2d at 1070. We held that there was no basis under the statute for

[2] The third requirement is found in subsection (a)(3)(B) of the statute.

DOC's policy of denying credit time for a high school diploma not earned in Indiana, "assuming that the requirements for earning the out-of-state diploma are similar to Indiana's requirements." *Id.* We noted that while subsection (a)(3)(B) of the statute requires only that a person obtain "a high school diploma" to receive credit time, subsections (a)(3)(C) and (D), dealing with associate's and bachelor's degrees, require that such degrees be obtained from "an approved institution of higher learning" as that term is defined in Indiana Code section 20-12-21-3. *Id.* Although we recognized in *McGee* that subsection (a)(3)(B) did not place similar requirements on high school diplomas, we found Indiana Code section 20-12-21-3 "instructive." *Id*. At that time, this statute referred to the definition of an "'approved secondary school," stating that the term means a "public high school located in the state and any school, located in or outside the state, that in the judgment of the superintendent provides a course of instruction at the secondary level and maintains standards of instruction substantially equivalent to those of public high schools located in the state." *Id*. (citing Ind.Code § 20-12-21-3(3)).[3]

Here, although the DOC failed in both its initial denial and in its denial of the classification appeal to state the contents of its policy that led to the denial of Steele's petition for credit time pursuant to Indiana Code section 35-50-6-3.3(a), it did clarify its policy in an affidavit attached to the State's "Motion For Summary Disposition." The

[3] I.C. § 20-12-21-3 was repealed by P.L. 2007, § 390. It has been replaced by Indiana Code section 21-12-1-5, which contains almost identical language to the former statute.

affiant, who identifies himself as the Education Program Coordinator for the DOC, avers that LCA is unaccredited and that DOC "has not approved [LCA] for an award of educational credit time, and [Steele] is not eligible for credit time for his diploma from this school." (App. 62). As noted above, the post-conviction court followed the DOC's lead and denied Steele's request for credit time because LCA is unaccredited.

An approved secondary school is required to provide instruction at the secondary level and maintain standards of instruction *substantially equivalent* to those of public high schools located in the state. *See McGee*, 790 N.E.2d at 1070; I.C. § 20-12-21-3 (now I.C. 21-12-1-5). It is not required to be an accredited public high school. Accordingly, both the DOC and the trial court erred as a matter of law in determining that Steele should be denied credit time because LCA is unaccredited. We reverse and remand to the post-conviction court for a hearing on Steele's request.

Reversed and remanded.[4]

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[4] The State cites a footnote in *Samuels v. State*, 849 N.E.2d 689, 692 n.2 (Ind. Ct. App. 2006), *trans. denied*, for the proposition that a secondary school must be accredited and that a petitioner must show that the school taught certain subjects. In *Samuels*, unlike in the present case, the court dismissed the appeal because the petitioner failed to exhaust his administrative remedies. The footnote cited by the State is *dicta* and is of no precedential value.

Interestingly, Judge Sullivan dissented in *Samuels*, pointing out that the DOC has no authority to establish admissions criteria and other requirements for programs available for earning credit time under subsection (a) of I.C. § 35-50-6-3.3. *Id*. at 693. He also pointed out that the statute did not provide "an accreditation requirement for the obtaining of a high school diploma." *Id*.

In P.L. 228-2011, § 2 (effective July 1, 2011), the legislature responded by amending I.C. § 35-50-6-3.3 to require that an inmate seeking an education credit for earning a high school diploma must obtain approval of the correspondence course from the DOC before the person begins the course and that the DOC may approve a correspondence course "only if the entity administering the course is recognized and accredited by the department of education in the state where the entity is located."

FRIEDLANDER, J., and VAIDIK, J., concur.