COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP607 **Cir. Ct. No. 2013CV000906**

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

STATE OF WISCONSIN EX REL. MAXIMILIANO MEJIA,

PETITIONER-APPELLANT,

V.

WISCONSIN PAROLE COMMISSION, KATHLEEN NAGLE, CHAIR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Maximiliano Mejia, *pro se*, appeals from a circuit court order denying his petition for certiorari review. Mejia argues that his petition should not have been denied because the Wisconsin Parole Commission "did not act according to law," acted arbitrarily and unreasonably, and "exceeded

its jurisdiction," and because his parole is being denied based on his detainer from the Bureau of Immigration and Customs. We affirm the order denying Mejia's petition for certiorari review.

¶2 In August 1996, Mejia was sentenced to thirty-five years in prison for first-degree reckless homicide. The homicide victim was Mejia's friend and co-worker. The two men argued and Mejia stabbed the man in the stomach and fled. The man bled to death.

¶3 In February 2012, Mejia was denied parole and he filed this certiorari action. Due to delays caused in part by a change in venue, Mejia had another parole review hearing before the circuit court could consider the Commission's February 2012 decision. Upon stipulation of the parties, the circuit court instead considered the Commission's December 2012 decision denying Mejia parole.[1] The circuit court denied the certiorari petition and this appeal follows.

DISCUSSION

¶4 On certiorari review, we consider the decisions of the Commission, not those of the circuit court, and the scope of our review is identical to that of the circuit court. ***State ex rel. Saenz v. Husz***, 198 Wis. 2d 72, 76, 542 N.W.2d 462

[1] While the petition was pending before the circuit court, Mejia had yet another parole hearing. The Commission indicated at the circuit court (and again in this appeal) that the September 2013 parole review could render the certiorari action moot, but the Commission urged the circuit court to undertake its review on the merits. The circuit court's written order stated: "His parole was deferred again on September 27, 2013, but the parties agree that this denial does not render moot [Mejia's] request for judicial review of the earlier parole denial." Based on the parties' positions in the circuit court and on appeal, this court will accept their assertions that the appeal is not moot.

(Ct. App. 1995). We review whether the Commission: (1) kept within its jurisdiction; (2) acted according to law; (3) acted arbitrarily, oppressively or unreasonably; "and (4) whether the evidence was such that [the Commission] might reasonably make the order or determination in question." ***State ex rel. Hansen v. Dane Cty. Cir. Ct.***, 181 Wis. 2d 993, 998-99, 513 N.W.2d 139 (Ct. App. 1994).

> The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion…. The inmate has the burden of proving by a preponderance of the evidence that the actions of the agency were arbitrary and capricious. If the inmate fails to sustain this burden, the courts will not interfere with the agency's decision.

Richards v. Graham, 2011 WI App 100, ¶6, 336 Wis. 2d 175, 801 N.W.2d 821 (citations and one set of quotation marks omitted).

¶5 Parole rests within the Commission's discretion. ***Coleman v. Percy***, 96 Wis. 2d 578, 587, 292 N.W.2d 615 (1980). In this case,[2] that discretion is guided by WIS. ADMIN CODE § PAC 1.06(7) (Oct. 2000):

> A recommendation for parole and a grant of parole shall be made only after the inmate has:
>
> (a) Become parole-eligible under s. 304.06, Stats., and s. PAC 1.05;
>
> (b) Served sufficient time so that release would not depreciate the seriousness of the offense;
>
> (c) Demonstrated satisfactory adjustment to the institution and program participation at the institution;

[2] The Commission explains that the parole factors were amended in 2010, *see* WIS. ADMIN. CODE § PAC 1.06(16) (Register, Nov. 2010, No. 659, eff. 12-1-10), but "the amended factors do not apply to Mejia because he committed his offense in 1996."

> (d) Developed an adequate parole plan; and
>
> (e) Reached a point at which, in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public.

¶6 In its December 2012 decision, the Commission identified two reasons for denying parole: (1) "Release at this time would involve an unreasonable risk to the public"; and (2) "You have NOT served sufficient time for punishment." *See* WIS. ADMIN CODE § PAC 1.06(7)(b) & (e) (Oct. 2000). The Commission provided additional comments in which it discussed the facts of the crime and Mejia's show of remorse. The Commission also recognized that there is a Bureau of Immigration and Customs detainer in place and that Mejia will be deported after his release. Finally, the Commission stated:

> The Parole Commission is endorsing consideration for custody reduction with transfer to a fenced minimum site. Although you would still be in a fenced environment there is an increased level of responsibility that accompanies such [a] transition and the Parole Commission would like to monitor your adjustment to such transition before making a recommendation for release to your detainer. In the meantime serving additional time and doing so in a productive manner will help to demonstrate a mitigated level of risk.

¶7 Mejia challenges the Commission's decision on several bases. First, he argues that the Commission "did not act according to law" because "there's no reasonable justification in denying Mejia parole." (Some capitalization omitted.) Mejia argues that his "institution adjustment and program participation [have] been excellent" and that he "poses no unreasonable risk to the public." He also notes that once he is deported, he is "never coming back to the United States."

¶8 We are not persuaded that the Commission failed to act according to law, *see* ***Hansen***, 181 Wis. 2d at 998, because it was within the Commission's

discretion to determine that Mejia had not served sufficient time for punishment[3] and that Mejia's release would involve an unreasonable risk to the public, *see* WIS. ADMIN CODE § PAC 1.06(7) (Oct. 2000). While Mejia claims his adjustment has been "excellent," the Commission's December 2012 decision described Mejia's institutional conduct and program participation as "satisfactory."[4] Further, the record indicates that Mejia had some minor conduct reports, which he discussed at his December 2012 hearing. We agree with the circuit court's observation that while Mejia may believe he has served sufficient time for this "senseless" crime, "reasonable minds could quite easily disagree with Mr. Mejia's view."

¶9 Mejia's remaining three arguments relate to his claim that the only reason he is being denied parole is because he has not served time in a minimum-security facility, which Mejia asserts the Department of Corrections will not allow because of the Bureau of Immigration and Customs detainer. Mejia's parole was not denied solely because he has not served time in a minimum-security facility. The Commission determined that Mejia had "NOT served sufficient time for punishment." That valid basis for denying Mejia parole is not dependent on serving time in a minimum-security facility and justifies the Commission's decision to deny parole.

¶10 As for Mejia's claim that he has been placed in a "catch 22 scenario" because the Department of Corrections will not place inmates with Bureau of Immigration and Customs detainers in minimum-security facilities, we are not

[3] Mejia has served about half of his thirty-five-year sentence.

[4] In addition, according to Mejia's appellate brief, the Commission told him in April 2011 that his program participation had "not been satisfactory." This undercuts Mejia's suggestion that his performance has been "excellent."

convinced that this provides a basis to overturn the Commission's decision at this time. Whether Mejia can seek relief from the Commission, the Department of Corrections, or another entity is an issue that will be ripe for decision only after the Commission determines that Mejia has served sufficient time for punishment, that he must still serve time in a minimum-security facility before release, and that there are no other barriers to his release on parole.

By the Court.—Order affirmed.

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