

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 2015

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. 2014AP1347

Cir. Ct. No. 2013CV256

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. JAMIE D. JARDINE,

PETITIONER-APPELLANT,

V.

KATHLEEN NAGLE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Jamie Jardine, pro se, appeals an order dismissing his petition for a writ of certiorari challenging the Wisconsin Parole Commission's decision to deny him release on parole. We affirm.

¶2 At the time of the parole review at issue, Jardine had served just nineteen years of a sixty-year sentence for attempted first-degree intentional homicide and four counts of first-degree sexual assault. The Commission denied Jardine release on parole and deferred his next consideration for thirty-six months.¹ Jardine subsequently filed a petition for a writ of certiorari in the circuit court that was dismissed after briefing and a hearing on the merits. Jardine now appeals.

¶3 On certiorari review, we are limited to determining: (1) whether the Commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.² See *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980).

¶4 The prisoner has the burden of proving by a preponderance of the evidence that the actions of the Commission were arbitrary and capricious. *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d

¹ After the Commission denied him release on parole, Jardine wrote several letters about the decision. The Commission responded to each letter and also issued an amended parole decision, again denying release on parole and deferring Jardine's next consideration for thirty-six months. The Commission noted the decision was amended to correct misstatements regarding details of the offense. No change in his parole eligibility date occurred as a result of the amendment.

² We note at the outset that Jardine's arguments are largely conclusory and underdeveloped. We generally do not consider such arguments. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, Jardine's arguments are meritless.

878. If the prisoner fails to sustain the burden, the courts will not interfere with the Commission's decision. *Id.*

¶5 Where two conflicting views may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. See *Robertson Transp. Co. v. PSC*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). Thus, the agency's decision must be upheld if supported by any reasonable view of the evidence. See *Nufer v. Village Bd. of Village of Palmyra*, 92 Wis. 2d 289, 301, 284 N.W.2d 649 (1979).

¶6 In determining whether Jardine should be released on parole, the Commission considered proper factors and concluded:

1. You have NOT served sufficient time for punishment.
2. Your institution conduct has been satisfactory.
3. Your program participation has NOT been satisfactory.
4. You have developed an adequate plan, but will need Agent's verification.
5. Release at this time would involve an unreasonable risk to the public.

¶7 As a preliminary matter, Jardine contends the Commission improperly relied on the "sufficient time for punishment" factor, in effect prior to 1993, rather than the "sufficient time so release would not depreciate the seriousness of the offense" factor, in effect after that date. However, the difference between "sufficient time for punishment" and "sufficient time so that release would not depreciate the seriousness of the offense" is semantic. Both standards require the Commission to consider the nature of the offenses committed and whether the length of time served under the circumstances demonstrates a

sufficiently weighty consequence for the particular offenses. The result would therefore be the same regardless of which standard was applied.

¶8 Jardine argues the “sufficient time” factor was not a valid reason for denying parole, and suggests that once he reached parole eligibility, he had *per se* served sufficient time such that release would not depreciate the seriousness of his offense. Jardine is wrong. As the Commission properly informed him during the parole hearing, parole eligibility “doesn’t mean you’re entitled to release before [mandatory release].”

¶9 Jardine also argues, “In furtherance of the Commission’s sadistic desire to **punish** more severely than the [sentencing] court[], the Commission illegally altered Jardine’s parole eligibility date (PED) by establishing a ‘New’ PED as part of the 36 month deferral.” Again, Jardine is incorrect. A prisoner’s initial parole eligibility date is established by statute. *See* WIS. STAT. § 304.06(1)(b).³ The Commission denied Jardine’s release on parole and scheduled a subsequent review date to determine if he would meet the criteria for release after a thirty-six-month deferral. This next review date was designated as the “NEW PED” in the written parole decision, so as not to confuse it with the initial parole eligibility date. The subsequent review date did not effectively resentence him to an additional thirty-six months of incarceration, as Jardine perceives.

¶10 Jardine also challenges the Commission’s conclusion that Jardine’s program participation was not satisfactory. Jardine was identified as requiring a

³ References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sex offender program known as “SO4,” but he had not completed the program at the time of his parole review. Based on the record, the Commission reasonably concluded that Jardine’s program participation was unsatisfactory because he did not complete a required program.

¶11 Jardine apparently contests his need for SO4 treatment, but a challenge to the sex offender treatment requirement is not properly raised on certiorari review of a parole denial because certiorari reviews an agency decision. The agency decision in this case is the Commission’s decision to deny Jardine parole. Jardine’s challenge to the sex offender treatment requirement is thus not properly before this court. Jardine also takes issue with the fact that the required program was unavailable at this point in his sentence structure, but the Department of Corrections is not obligated to provide treatment or any other programs that might be considered a condition precedent to parole. *See Garza v. Miller*, 688 F.2d 480, 486 (7th Cir. 1982).

¶12 Jardine also contends that requiring him to complete sex offender treatment imposes a new punishment upon him in violation of the ex post facto clause. He claims he will be denied a legitimate parole review until he completes an unavailable program, and thus his eligibility for parole has been altered. However, Jardine fails to provide sufficient record support for his contention that SO4 will only be provided at or near his mandatory release date.

¶13 In any event, the focus of the ex post facto inquiry is not on a prisoner’s opportunity to take advantage of provisions for early release on parole, but on whether the definition of criminal conduct has been altered or the penalty by which a crime is punishable has been increased. *See California Dep’t of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). The decision to release a prisoner on

parole rests on a myriad of factors, and Jardine cannot show that requiring him to complete SO4 treatment necessarily increased his period of incarceration such that it could be considered increased punishment for the purposes of the ex post facto clause. *See id.* at 507-09.

¶14 Jardine also argues the Commission exceeded its jurisdiction by independently assessing WIS. STAT. ch. 980 requirements. Jardine was convicted of four counts of first-degree sexual assault, which means he committed “sexually violent offenses” under ch. 980, and is subject to the provisions of that chapter. *See* WIS. STAT. § 980.01(6). The Commission indicated as much in its decision by stating “Yes” in the “980” box on the parole form. There is no suggestion in the record the Commission made an independent assessment of whether Jardine is a sexually violent person under ch. 980. Instead, we interpret the Commission’s notation to mean that ch. 980 applies to him based upon the offenses for which he was convicted.

¶15 Jardine next contends the Commission improperly considered a previous waiver of parole consideration in making its decision to deny him release on parole. In its written parole decision, the Commission noted, “This is your second appearance before the commission and you had previously waived consideration because you did not believe you would receive impartial consideration.” At the parole interview, the Commissioner asked Jardine why he waived his previous appearance. Jardine explained he waived the appearance because he did not think he would receive a fair hearing. The Commissioner asked Jardine why he reapplied, and Jardine responded, “Ah my social worker told me to reapply.” The Commissioner then took the opportunity to explain what she would be reviewing at the hearing and the interview proceeded. The record fails

to show that Jardine's previous waiver of parole consideration negatively affected the parole decision at issue.

¶16 Jardine also challenges the Commission's determination that his release would involve an unreasonable risk to the public. The Commission considered Jardine's good institution conduct, adequate parole plan, and his completion of several educational, vocational, and other elective programs. However, the Commission reasonably concluded these factors were outweighed by the seriousness of Jardine's offenses, the length of time served, and his incomplete sex offender treatment.

¶17 The record supports the Commission's conclusion that Jardine posed a substantial risk to the public. Here, the facts of Jardine's crimes are particularly heinous. Jardine handcuffed his victim and engaged in repeated violent rape at gunpoint. He then forced her to march at gunpoint to the back room of a building and kneel down facing a wall. Under these circumstances, the victim could have reasonably believed she was in an execution situation. Ultimately, the victim suffered a gunshot wound and a severe skull fracture, causing significant physical problems including brain damage, in addition to psychological trauma.

¶18 Jardine nevertheless insists the Commission "created a hostile and oppressive hearing in order to re-try the conviction by holding Jardine hostage to ... false information"⁴ In particular, Jardine claims the Commission

⁴ We specifically reject Jardine's continued attempts to minimize the incident, to the point of insisting in his briefs to this court that there was "no physical trauma caused by Jardine," and that both he and the victim "have no idea how the injury occurred." As the circuit court correctly recognized at Jardine's sentencing, the court is "duty bound to accept the jury's version of the facts, and not the defendant's."

incorrectly stated that he forced the victim to have mouth to penis contact when in fact he forced her to have mouth to vaginal contact. The Commission corrected the details in an amended decision, and there is no indication any mistake concerning the type of oral sex was determinative to the parole decision. This is especially true given the fact that a jury convicted Jardine of all five counts, including one count of attempted first-degree intentional homicide and three counts of penis to vaginal intercourse, in addition to the count involving mouth to vaginal contact.

¶19 Jardine contends the Commission incorrectly described the victim's head injuries as including "bone fragments that had been driven far into the brain," and incorrectly assumed the victim suffered a long-term brain injury. There is ample evidence in the record of the serious nature of the victim's head injuries, including the long-term consequences of the injuries. In the amended parole decision, the Commission made it clear that the victim's medical records were not reviewed, but that there were nevertheless "numerous sources within the file" that described the victim's head injuries.

¶20 Jardine also complains that the Commission implied he attempted to rob the business at which the victim was employed by stating that Jardine "directed her at gun point to show you where the money was kept in the business" However, there is no indication the Commission considered any armed robbery offense in denying release on parole.

¶21 Jardine further asserts the Commission was bound by constitutional due process considerations in the parole determination. For example, Jardine reasons "if convicted defendants have Due Process Rights to be sentenced on

accurate information then, it is reasonable and plausible that parole determinations **shall** be held on accurate information too.”

¶22 Wisconsin has a discretionary parole system, and only the Commission is authorized to exercise that discretion. *See Gendrich*, 246 Wis. 2d 814, ¶¶7-8. This discretionary parole system does not create a protectable liberty interest in parole. *Id.* Because Jardine was not entitled to release on his parole eligibility date, he was not entitled to due process protections. *See id.*, ¶10.

¶23 But even if we could somehow assume that Jardine was entitled to due process protections, we would hold that he received all the due process to which he was entitled. Jardine was provided with an opportunity to be heard, and the parole decision informed Jardine in what respects he fell short of qualifying for parole. On review, we conclude the decision to deny parole was not arbitrary, oppressive, or unreasonable. Rather, the Commission properly exercised its discretion in determining that Jardine had not served sufficient time, his program participation was unsatisfactory, and his release would involve an unreasonable risk to the public.

By the Court.—Order affirmed.

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

