COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP186 **Cir. Ct. No. 2008CV4905**

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

STATE OF WISCONSIN EX REL. LARRY J. BROWN,

PETITIONER-APPELLANT,

V.

RICK RAEMISCH , SECRETARY, DEPARTMENT OF CORRECTIONS AND ALFONSO GRAHAM , CHAIR, WISCONSIN PAROLE COMMISSION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry J. Brown appeals *pro se* from a circuit court order affirming a Wisconsin Parole Commission decision to deny him discretionary parole. He argues that the Commission did not act according to law

and that its decision was arbitrary and capricious and represented its will and not its judgment, because he is being subjected to ex post facto laws. Brown also argues that the circuit court should have granted his motion to compel the production of certain documents. We reject his arguments and affirm.

¶2 In 1983, Brown began serving an eighty-year sentence for four counts of first-degree sexual assault and two counts of armed robbery. Brown became eligible for discretionary parole on July 5, 1985, and his mandatory release date is May 8, 2019.

¶3 In February 2008, the parole Commission denied Brown discretionary parole.[1] The written decision provided in relevant part:

> Not much progress has been made since the time of your last parole interview. In 2/07 you were transferred to

[1] WISCONSIN ADMIN. CODE § PAC 1.06(7) discusses the factors the parole commission considers:

> **(7)** 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;
>
> (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.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> [a lower security facility] but you received two major tickets, one of which was for sexual misconduct, so you have been returned to a maximum security facility. You have historically had problems with conduct; with the PRC summary from 6/07 noting "9 majors for sexual misconduct, 5 for soliciting staff and 9 for lying about staff" just to mention a few…. You still need to enter and successfully complete[] AODA-residential and SO-4 [a sex offender treatment program]…. You … have served a little over 25 years of a sentence totaling 80 years…. You robbed and sexually assaulted three different women on three different occasions, who were strangers to you, and this included forced intercourse at knifepoint. One of the victims was cut…. A history of substance abuse is noted and played a role in your criminality. For the past two parole interviews you were given 12 month deferrals in the hope that there could perhaps be some positive change in your circumstances regarding conduct and treatment but that has not occurred. At this time, the facts remain that you are an untreated sex offender, who has and continues to engage in sexual misconduct while confined. You are in need of two treatment programs, one that minimally takes about three years to complete, and you are not even close to getting into that due to continued misconduct…. The risk you present as evidenced by misconduct and unmet treatment needs supports the elevation in the length of the deferral from what was previously recommended.

After this decision was issued, the Commission revised its decision, based on the expungement of one instance of misconduct. The Commission explained:

> After the parole interview conducted on 2-07-08 information was received that one of the recent major conduct reports received by the inmate has been expunged from the record. Therefore, the reference made to receipt of two major tickets is corrected as there was only one recent major. Also, the specific number of some types of infractions was corrected to read 11 tickets for sexual misconduct, 5 for soliciting staff, and 3 for lying about staff. Conduct is not the sole issue the parole commission takes into consideration…. The remainder of the comments reflect[] the status of the inmate … and clearly justif[y] the decision made on 2-07-08.

¶4 Brown petitioned for *certiorari* review in the circuit court. The circuit court established a briefing schedule and later issued a written decision affirming the Commission's decision. This appeal follows.

¶5 Our standard of review is identical to the standard applied by the circuit court. ***State ex rel. Saenz v. Husz***, 198 Wis. 2d 72, 76, 542 N.W.2d 462 (Ct. App. 1995). ***Husz*** explained:

> Our review is 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. The test is whether reasonable minds could arrive at the same conclusion reached by the commission.

Id. at 76-77 (citation omitted).

¶6 Brown does not challenge the first and fourth factors for review. We conclude that the Commission kept within its jurisdiction and that the evidentiary record supports the Commission's decision. The record demonstrates that the Commission followed the parole eligibility criteria found in WIS. ADMIN. CODE § PAC 1.06(7). The Commission recognized that Brown had failed to complete AODA programming or sex offender treatment and had demonstrated continued conduct problems. Because Brown had not "[d]emonstrated satisfactory adjustment to the institution and program participation" and his rehabilitation had not reached a point where the Commission could be confident that Brown "would not pose an unreasonable risk to the public," *see* § PAC 1.06(7)(c) and (e), it was reasonable for the Commission to conclude that discretionary parole was not warranted.

¶7 We turn to Brown's allegations that the Commission did not act according to law and that its action was arbitrary and capricious. As best we can discern, Brown offers five reasons (each explained in a single paragraph) why the Commission's action was in error, and he indicates that in each case, he is being subject to an ex post facto law. First, Brown contends that the Commission

> cites in the face of appellant['s] Parole Applications and PRC Summaries since 1993 and 2003 to the present, "specific and egregious conduct of his crime" as a new factor in considering his parole application, when "prior" to 1993 and 2003, no such "specific and egregious conduct of the crime" was considered nor used, and is an ex post facto law. Appellant argues here that to apply this [standard] to his parole applications and PRC summaries to deny his parole supervision, criminalizes conduct that was innocent when committed [and] increases [the] penalty for conduct after its commission.

(Emphasis omitted.) Second, Brown asserts that "[t]he parole commission now uses 'notice' to the victim … as a new factor in considering [Brown's] parole application[s] since 1993." (Emphasis omitted.) Third, Brown argues that the Commission "now uses [WIS. STAT. §] 302.11(b)(2) to 'create' a 'significant risk' of prolonging appellant['s] incarceration based on false, inaccurate and erroneous documents … by upgrading his [six-month] sex offender treatment … to a [four-year] … treatment program." (Emphasis omitted.) Fourth, Brown asserts that the Commission "now uses 'Masturbation' in prison, as a new factor to consider appellant['s] parole applications since 1993." (Emphasis omitted.) Finally, Brown contends that the Commission has "re-labeled [him] a 'drug addict', rather than a[n] 'alcohol treatment' need" [sic] and changed his sex offender treatment.

¶8 The first four arguments appear to assert ex post facto claims: that the Commission is applying a new regulation or law to determine if Brown should be paroled. As the State points out, *certiorari* review is not the proper means of

challenging the constitutionality of a state law or Department of Corrections (DOC) regulations, because of the limited scope of our review. *See* ***Husz***, 198 Wis. 2d at 76-77. Therefore, we will not address whether Brown has been subjected to ex post facto laws or regulations.

¶9 Brown's fifth challenge to the Commission's decision is that the Commission or the DOC are directing him to certain AODA and sex offender treatment programs. We decline to review this issue because it is not appropriate to challenge the treatment that has been recommended for an inmate in a *certiorari* appeal of a Commission's decision denying discretionary parole. *See* ***id.***

¶10 For the foregoing reasons, we reject Brown's challenges to the Commission's decision denying him discretionary parole. Applying the limited review authorized in *certiorari* cases, *see* ***id.***, we conclude that the Commission's decision must be upheld.

¶11 Brown raises one additional issue on appeal. He contends that the circuit court erroneously exercised its discretion when it failed to answer Brown's motion to compel the Commission to produce records that, according to his motion, appear to be related to his concerns about the structure of his sentence and his mandatory release date. This issue is likewise outside the scope of *certiorari* review. Therefore, the circuit court did not erroneously exercise its discretion when it did not grant Brown's motion to produce the requested information.

By the Court.—Order affirmed.

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