

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP1411

Cir. Ct. No. 2008CV586

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. JAMIE D. JARDINE,

PETITIONER-APPELLANT,

V.

ALFONSO GRAHAM, WISCONSIN PAROLE COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jamie Jardine appeals an order affirming a decision of the Wisconsin Parole Commission denying his application for discretionary parole. The Commission denied parole based in part on findings that Jardine had not served sufficient time for punishment, his program participation has not been

satisfactory, and release at this time would involve an unreasonable risk to the public. Jardine contends these findings do not provide a legitimate basis for denying parole, are not supported by the evidence and violate the prohibition against ex post facto laws because: (1) the findings reflect the policies of a former governor and secretary of the Department of Corrections to deny discretionary parole until an inmate is close to his mandatory release date; (2) the finding that Jardine did not serve sufficient time as punishment exceeds the parole commission's authority; and (3) the finding that Jardine continues to pose a risk to the public because he did not complete treatment programs constitutes a "Catch-22" because the prison would not allow him in the appropriate programs.¹ We reject these arguments and affirm the order.

¶2 Jardine was sentenced to sixty years in prison for attempted first-degree intentional homicide and four counts of sexual assault. This was his first consideration for parole, having completed fifteen years of the sixty-year sentence. The Commission denied parole because Jardine had not served sufficient time for punishment. Although he had no conduct reports in the past year, he had a

¹ Some of Jardine's arguments are based on documents that are not included in the certified record. This extraneous evidence is not properly before the court. See *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993). Jardine also raises constitutional issues as to each finding that will not be individually addressed. His due process arguments fail because Wisconsin's discretionary parole scheme does not create a protectable liberty interest in parole. See *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶7, 246 Wis. 2d 814, 632 N.W.2d 878. The Commission satisfied Jardine's due process rights by stating its reasons for denying parole and providing the court with sufficient information to determine whether the denial was based on impermissible grounds. See *Solomon v. Elsea*, 676 F.2d 282, 286 (7th Cir. 1982). Jardine's equal protection argument is not adequately developed, and does not show intentional discrimination because of his membership in a particular class. See *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989). Jardine's argument that the Commission violated his Eighth Amendment rights by "deliberate indifference" to his mental health lacks any merit. He does not identify any deprivation that was sufficiently serious to deny the basic necessities of civilized life. See *Farmer v. Brennan*, 511 U.S. 825 (1994).

number of major conduct reports in the past. He participated in sex offender treatment for nine months in 1997 and 1998, but was terminated with a very negative report. He was subsequently placed in the Deniers Program, which is no longer available. In 2007, he was evaluated and recommended for a sex offender treatment program. Completion of that program, the evaluation concluded, will be essential in reducing his risk to the community. He has been trying to access a sex offender program, but has not been admitted.

¶3 On certiorari review, the reviewing court 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. *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980). The inmate carries the burden of proving the Commission's action was arbitrary and capricious. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971). The court's inquiry is limited to whether there is substantial evidence to support the decision. *State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984).

¶4 The Parole Commission was required to consider factors set out in WIS. ADMIN. CODE § PAC 1.06(7) (Oct. 2000), which includes whether an inmate "served sufficient time so that release would not depreciate the seriousness of the offense ... demonstrated satisfactory adjustment to the institution and program participation at the institution ... and reached a point at which, in the judgment of the Commission, discretionary parole would not pose an unreasonable risk to the public." The Commission's decision appropriately considers these factors. Jardine had an unsuccessful history with sex offender treatment, in part because he

alleged the victim was a prostitute and denied the sexual assaults. He had not completed the recommended sex offender programs at the time of his parole review. The Commission reasonably concluded that failure to complete the required sex offender treatment makes him a risk to the public, regardless of the reason for failure to participate in the program. *Gendrich*, 246 Wis. 2d 814, ¶13.

¶5 The former governor's policy directive is irrelevant to this case. First, evidence of the directive was not considered by the Commission and is not a part of the certified record. Therefore, it cannot serve as a basis for certiorari review. In addition, the directive related to releasing violent offenders who had reached their mandatory release date and were not subject to the new presumptive mandatory release law, WIS. STAT. § 302.11(1g) (2007-08).² Jardine has not reached his mandatory release date and the memorandum is not applicable to him.

¶6 The Commission acted according to law when it concluded Jardine had not served sufficient time for punishment. Jardine appears to believe that upon reaching eligibility for parole, he has completed the punishment portion of his sentence, and having the Commission require additional punishment violates the ex post facto clause of the United States Constitution. A sentence is not divided into segments, and nothing in the law suggests that the portion of the sentence served from the date of sentencing to the first parole hearing constitutes the only punishment phase. The fallacy of that argument is shown by the fact that discretionary parole at one time was available to most felons who had completed only six months of their sentence. *See* WIS. STAT. § 57.06(1) (1981-82). Jardine's

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

argument would suggest the legislature deemed only six months of their sentences to constitute appropriate punishment for most felonies.

¶7 The Commission's decision to require additional time for punishment does not constitute an ex post facto law. The prohibition against ex post facto laws applies only to statutory changes and changes in administrative regulations that represent an exercise of delegated legislative authority as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws. *Prater v. United States Parole Comm'n*, 802 F.2d 948, 953-54 (7th Cir. 1986). The focus of the ex post facto inquiry is whether a legislative change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). Jardine established neither of these factual bases to support his ex post facto argument.

¶8 Finally, Jardine's argument that he has not been provided with the necessary treatment to qualify for parole fails for several reasons. First, the Program Review Committee, not the Parole Commission, determines an inmate's eligibility for various programs. Second, 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). Third, Jardine's denial of guilt, blaming the victim, and his accusation that the charges arose as a "politically driven vindictive prosecution" support the Commission's finding that Jardine's program participation has not been satisfactory.

By the Court.—Order affirmed.

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

