COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2379 **Cir. Ct. No. 2012CV361**

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

STATE OF WISCONSIN EX REL. LARRY E. BEERBOHM,

PETITIONER-APPELLANT,

V.

PAROLE COMMISSION AND GARY HAMBLIN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Larry Beerbohm appeals a circuit court order affirming a decision of the parole commission to deny Beerbohm's petition for

release to extended supervision for extraordinary health circumstances under WIS. STAT. § 302.1135 (2009-10).[1] Beerbohm contends that: (1) this court owes no deference to the parole commission's interpretation of § 302.1135; (2) the question of whether release is in the public interest under § 302.1135 must include consideration of Beerbohm's constitutional right to adequate medical care; (3) Beerbohm was denied due process because the parole commissioner relied on an ex parte communication with Beerbohm's social worker; (4) Beerbohm was denied his right to have his petition for release heard by the entire parole commission when his petition was heard and decided by one parole commissioner; and (5) Beerbohm is entitled to file annual petitions for release under the law as it existed when he filed his petition in this case. We conclude that we have no basis to disturb the parole commission's decision, and that the question of Beerbohm's right to file petitions in the future is not ripe for review.[2] Accordingly, we affirm.

Background

¶2 In August 2008, Beerbohm was convicted of two counts of repeated sexual assault of the same child. The circuit court sentenced Beerbohm to a total of twelve years of initial confinement and twenty years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] We note that Beerbohm has failed to include the circuit court opinion and the parole commission's decision in his appendix, contrary to WIS. STAT. RULE 809.19(2)(a). The State has provided a supplemental appendix, but includes only the circuit court order, not the decision of the parole commission. Because we review the decision of the parole commission, not the circuit court, the parole commission's decision is essential to our understanding of the issues in this case. *See* ***id.*** We admonish the parties to adhere to the appellate rules in the future.

¶3 In April 2011, Beerbohm petitioned the Earned Release Review Commission (ERRC) to modify Beerbohm's sentence to allow release to extended supervision based on an extraordinary health condition.[3] Beerbohm attached two affidavits from physicians asserting that Beerbohm has an extraordinary health condition due to: (1) advanced age of sixty-two; (2) infirmity and disability, including dementia, very poor memory, confusion, major depression, posttraumatic stress disorder, diabetes, asthma, hypertension, obesity, and probable Lewy body disease; and (3) need for treatment not available in the correctional facility, including a less restrictive and less stressful environment, and possibly nursing home care.

¶4 A parole commissioner held a hearing on Beerbohm's petition, and Beerbohm appeared with counsel. The commissioner explained at the outset of the hearing that he had reviewed Beerbohm's file and had spoken with Beerbohm's social worker. Beerbohm denied the conduct underlying his convictions, and stated he did not know that he was recommended for the intensive sex offender treatment program.

¶5 The commissioner stated that Beerbohm's social worker indicated that she was not aware of anything significant in terms of Beerbohm's adjustment. The commissioner also noted that two recent psychiatric reports indicated that Beerbohm had reported he was doing relatively well and that he did not have any

[3] While Beerbohm's petition was pending, a change in the law made Beerbohm ineligible for release based on an extraordinary health condition, and transferred review of petitions for release to the Program Review Committee (PRC). *See* 2011 Wis. Act 38, § 45. Beerbohm sought review by the parole commission under the law as it existed at the time Beerbohm filed his petition. The parole commission agreed to review Beerbohm's petition under the law as it existed prior to 2011 Wis. Act 38.

acute stressors. The psychiatric reports also indicated that, on one occasion, Beerbohm had refused to be seen.

¶6 Beerbohm indicated that sometimes he refused to be seen by clinical staff because he was not feeling well. Beerbohm also explained that he fears getting lost if he leaves his cell, and that he is unable to leave his cell to use the bathroom at night when his cellmate is sleeping and unable to help him.

¶7 Beerbohm's counsel argued that Beerbohm's diagnosis of Lewy Body disease and Beerbohm's service in the military in Vietnam were connected to a possible diagnosis of Parkinson's. Counsel argued that it would be very difficult and costly to treat Parkinson's within the prison, and that if Beerbohm were released, the federal government would be responsible for Beerbohm's treatment based on his military service. Counsel also asserted that Beerbohm could be effectively monitored in the community through extended supervision and sex offender rules. Counsel argued that, based on the costs of treating Beerbohm within the prison and the ability to monitor Beerbohm in the community, release would serve the public interest.

¶8 The parole commission denied Beerbohm's petition for release. The commissioner explained that Beerbohm had been convicted of very serious offenses, and that Beerbohm continued to deny his actions. The commissioner noted that the circuit court sentenced Beerbohm based on the substantial need to protect the public, and that the court was aware that Beerbohm had health problems. The commissioner noted that Beerbohm's social worker had indicated that Beerbohm was not having significant problems in his unit, and that Beerbohm remained housed in general population at Red Granite Correctional Institution

rather than at the infirmary at Dodge Correctional Institution, indicating that staff believed that Beerbohm's medical needs were being met.

¶9 Beerbohm sought certiorari review. The circuit court affirmed the decision of the parole commission. Beerbohm appeals.

Discussion

¶10 Beerbohm argues first that we owe no deference to the parole commission's interpretation of WIS. STAT. § 302.1135. *See* ***Racine Harley-Davidson, Inc. v. State***, 2006 WI 86, ¶¶8 n.4, 292 Wis. 2d 549, 717 N.W.2d 184 (appellate review of circuit court decision on certiorari is limited to decision of the administrative agency). Beerbohm asserts that the parole commission has no experience in interpreting when release of an inmate would serve the public interest, under § 302.1135. *See* ***Racine Harley-Davidson***, 292 Wis. 2d 549, ¶19 (on appeal of a decision on certiorari, no deference is given to an administrative agency's interpretation of a statute if the agency has no experience interpreting that statute). Thus, Beerbohm asserts, we should review de novo the meaning of "public interest" in § 302.1135, and whether the parole commission properly applied the law and facts in reaching its determination.

¶11 The State disputes that the parole commission does not have experience interpreting and applying WIS. STAT. § 302.1135. It also asserts that our review of the parole commission's decision is for an erroneous exercise of discretion. *See* § 302.1135(8). However, the State does not address whether we owe any deference to the parole commission's interpretation of § 302.1135 when reviewing whether the parole commission applied the proper legal standard. *See* ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999) (we review an exercise of discretion for whether the decision-maker "employed a

process of reasoning in which the facts and applicable law are considered in arriving at a conclusion based on logic and founded on proper legal standards").

¶12 We determine that we need not resolve what level of deference we owe the parole commission's interpretation of WIS. STAT. § 302.1135. Assuming that we owe no deference to the parole commission's interpretation of § 302.1135, we conclude that the parole commission properly exercised its discretion by denying Beerbohm's petition.

¶13 WISCONSIN STAT. § 302.1135 provides that an inmate may petition for release based on an extraordinary health condition. "'Extraordinary health condition' means a condition afflicting a person, such as advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution." WIS. STAT. § 302.1135(1)(b). At a hearing on the petition, the inmate has the burden to prove by the greater weight of the credible evidence that the inmate's release would serve the public interest. WIS. STAT. § 302.1135(5).

¶14 Beerbohm contends that it is in the "public interest" for Beerbohm to be released due to his extraordinary health condition. *See* WIS. STAT. § 302.1135. He argues that the parole commission failed to consider Beerbohm's constitutional right to adequate medical care in determining whether Beerbohm's release would serve the public interest. He argues that it is in the public interest to ensure that Beerbohm is not denied adequate medical treatment, subjecting him to cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Beerbohm contends that the parole commission ignored the medical evidence and that its decision was unreasonable.

¶15 The State responds that Beerbohm's Eighth Amendment rights are not at issue in this case. It asserts that our review in this case is limited to the parole commission's discretionary determination as to whether Beerbohm's release would serve the public interest. *See* WIS. STAT. § 302.1135(8). The State argues that if Beerbohm wishes to assert an Eighth Amendment violation, he must bring a federal action under 42 U.S.C. § 1983. The State also asserts that, in any event, the parole commission did consider Beerbohm's medical care in making its determination, by specifically referencing the physicians' affidavits and Beerbohm's recent psychiatric reports.

¶16 We conclude that the parole commission properly exercised its discretion by determining that Beerbohm's release would not serve the public interest. As we state above, we assume without deciding that we owe no deference to the parole commission's interpretation of the meaning of "public interest" under WIS. STAT. § 302.1135(5). We also assume without deciding that Beerbohm is correct that the question of whether release of an inmate would serve the "public interest" under § 302.1135(5) includes consideration of whether an inmate's Eighth Amendment rights have been violated. We reject Beerbohm's argument that the parole commission failed to take Beerbohm's Eighth Amendment rights into consideration because our review of the record reveals that Beerbohm did not present facts in support of an Eighth Amendment claim.

¶17 Beerbohm submitted physicians' affidavits to the parole commission stating that Beerbohm needed medical treatment not available within a correctional facility because: (1) "A less stressful and less intimidating [environment] where [Beerbohm] could pursue his unique artistic abilities would be very helpful"; and (2) Beerbohm required "counseling [and a] less restrictive environment, [and] may need nursing home or assisted living placement." At the

hearing before the parole commission, Beerbohm argued that his release was in the public interest because it was both difficult and expensive to treat him within the prison system, while he would qualify for veteran's benefits if he were released, and because he could be effectively monitored in the community. The evidence indicated that Beerbohm was receiving medical and psychiatric care, and that Beerbohm had refused to be seen by clinical staff on at least one occasion. Beerbohm did not argue or present evidence to the parole commission that the prison was acting with deliberate indifference to his medical needs. *See* ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976) ("deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (quoted source omitted)).

¶18 Because Beerbohm did not set forth an Eighth Amendment claim to the parole commission, the commission did not err by failing to consider that claim in reaching its determination. Rather, the record supports the parole commission's discretionary determination that Beerbohm's release would not serve the public interest, based on the seriousness of Beerbohm's offense, his ongoing denial, and the ability of the prison to meet Beerbohm's medical needs.

¶19 Next, Beerbohm contends that he was denied due process when the parole commission relied on the commissioner's communication with Beerbohm's social worker prior to the hearing. The State responds that Beerbohm does not have a liberty interest in sentence modification under WIS. STAT. § 302.1135, and thus due process rights are not implicated. The State also asserts that a hearing on a petition for sentence modification under § 302.1135 is not adversarial, and thus the concept of ex parte communications does not apply. The State then asserts that, in any event, Beerbohm was not harmed by the claimed ex parte communication, and thus is not entitled to relief. *See* ***State ex rel. Irby v. Israel***,

100 Wis. 2d 411, 425, 302 N.W.2d 517 (Ct App. 1981) ("An ex parte communication … is a material error only if the adverse party is prejudiced by an inability to rebut the facts communicated and if improper influence on the decision maker appears with reasonable certainty to have resulted.").

¶20 We conclude that even if Beerbohm was entitled to due process as to his petition for release and the communication between the parole commissioner and the social worker could be classified as ex parte, Beerbohm is not entitled to relief. While Beerbohm complains that the parole commission should not have relied on the social worker's statements, Beerbohm has not shown that he was "prejudiced by an inability to rebut the facts communicated" or that "improper influence on the decision maker appears with reasonable certainty to have resulted." *See* ***id.***

¶21 The parole commissioner stated that he spoke with Beerbohm's social worker a few days before the hearing and that the social worker had indicated that Beerbohm was residing in general population and had a cellmate. Beerbohm confirmed that was true. Beerbohm also confirmed that he was getting along with his cellmate and that he was assigned helpers in the unit to assist him getting around. The commissioner stated that Beerbohm's social worker had also indicated that the social worker had not heard anything significant in terms of Beerbohm's adjustment, and that Beerbohm seemed quiet and liked doing puzzles; Beerbohm confirmed that information, as well. Based on the above, we see two problems with Beerbohm's due process argument.

¶22 First, Beerbohm was given a chance to rebut the facts communicated: the parole commissioner specifically asked Beerbohm whether the information communicated by the social worker was correct, and Beerbohm

confirmed that it was. Beerbohm argues that he was unable to rebut that information due to lack of advance notice, lack of specificity as to the questions asked to the social worker and her answers, and Beerbohm's cognitive limitations. However, Beerbohm does not contend that the information stated on the record was untrue, and does not explain how he would have been able to rebut that information if he had advance notice or any more specific information.

¶23 Second, Beerbohm has not shown a reasonable certainty of improper influence on the decision maker. Beerbohm argues that the parole commission relied primarily on the social worker's comments, and that without those comments the commission would have been facing unrebutted medical evidence of Beerbohm's extraordinary medical condition. However, while the parole commission's decision noted the social worker's comments, it also noted the seriousness of Beerbohm's offenses and ongoing denial, that Beerbohm's psychiatric reports indicated that Beerbohm stated he was doing well and had refused to be seen on one occasion, and that the medical and clinical staff in the prison continued to treat Beerbohm's conditions and sought outside resources as necessary. Additionally, Beerbohm does not assert that the parole commission relied on any untrue statements by the social worker. Thus, to the extent the parole commission was influenced by the social worker's comments, Beerbohm has not shown that the parole commission was improperly influenced.

¶24 Next, Beerbohm contends that a petition under WIS. STAT. § 302.1135 must be heard by the entire commission, not one commissioner, as here. Beerbohm argues that § 302.1135(1)(a) defines "[c]ommission" as "the earned release review commission under s. 15.145," and that WIS. STAT. § 15.145(1) states that the earned release review commission consists of eight members. Beerbohm contends that the parole commission acted contrary to the

statutes by delegating authority to decide Beerbohm's petition to a single member. We disagree.

¶25 Beerbohm has not cited anything in the statutes requiring that a petition under § 302.1135 be heard by all eight members of the earned release review commission. As the State points out, the administrative code provides that parole commission actions are generally heard by a single commissioner. *See* WIS. ADMIN. CODE § PAC 1.07. We are not persuaded that Beerbohm was entitled to a hearing and review by the full commission in this case.

¶26 Finally, Beerbohm urges us to decide that he is entitled to file annual petitions under the law as it existed when he filed the petition in this case. Beerbohm contends that judicial efficiency will not be served by forcing him to file another petition and pursue an appeal to obtain a ruling as to his right to file successive petitions. However, whether or not judicial efficiency will be served by that process, it remains the process by which Beerbohm may obtain a ruling on that issue. The question of Beerbohm's right to pursue later petitions is not yet ripe, and we do not address it.

¶27 In sum, we discern no error in the decision by the parole commission to deny Beerbohm's petition. We do not address the question of Beerbohm's right to pursue later petitions, because that issue is not yet ripe for review. We affirm.

By the Court.—Order affirmed.

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