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DISTRICT II

January 3, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP320

Kim S. Szemborski v. Wisconsin Parole Commission
(L.C. # 2012CV896)

Before Brown, C.J., Reilly and Gundrum, JJ.

Kim A. Szemborski, pro se, appeals from an order denying his petition for a writ of certiorari from a November 16, 2011 decision of the Wisconsin Parole Commission. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We conclude that Szemborski's subsequent parole hearing rendered his claims moot, and we affirm.

At a release consideration (parole) hearing in August 2011, Commissioner E. Davidson recommended that Szemborski receive a grant of early release, or, parole. On November 16,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

2011, Commissioner K. Nagle, as chair of the commission, rejected the recommendation for parole and instead issued a twelve-month deferral. The chairperson disagreed with the commissioner's findings, determining that Szemborski had not served sufficient time for punishment and that release at this time would involve an unreasonable risk to the public. The chairperson cited to Szemborski's extensive criminal history and additional crimes committed while previously on parole. On December 29, 2011, Szemborski filed a petition for writ of certiorari in the trial court challenging the commission's decision denying parole. Subsequently, on August 20, 2012, a new parole hearing was held and release was again denied, this time in favor of an eleven-month deferral. In a decision and order dated December 21, 2012, the trial court denied Szemborski's certiorari petition, concluding that the case was mooted by Szemborski's 2012 parole review hearing. Szemborski appeals, arguing that the chairperson's decision was arbitrary and unreasonable, and that his claims were not rendered moot by the 2012 hearing.

“The scope of our review is identical to that of the trial court on certiorari.” *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). “Judicial review on certiorari is limited to whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision.” *Id.*

The dispositive issue in this case is whether Szemborski's subsequent parole hearing rendered his certiorari petition moot. An issue is moot when a party seeks a determination that will have no practical effect on an existing legal controversy, and generally, we will not consider moot issues on appeal. *See Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688

(Ct. App. 1985). Whether a case is moot is a question of law we review independently. *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶9, 338 Wis. 2d 462, 809 N.W.2d 58.

We conclude that Szemborski's subsequent parole hearing rendered his 2011 writ petition moot. See *State ex rel. Clarke v. Carballo*, 83 Wis. 2d 349, 357-58, 265 N.W.2d 285 (1978). In *Clarke*, the petitioner sought certiorari review of his parole board hearing on the ground that the parole board violated his due process rights by failing to follow proper procedure. *Id.* at 350. Though the *Clarke* court agreed that the parole board's failure to follow its own procedures was "arbitrary and unreasonable[.]" it affirmed the trial court's order denying Clarke's petition, concluding that because another parole hearing was subsequently conducted, the case was moot. *Id.* at 355-56 ("Had later parole hearings not been held prior to the hearing of this appeal, a new hearing held in conformity to the board's manual would be required."). The court reasoned that Clarke's remedy had he prevailed on certiorari review would have been another parole hearing, which was already conducted. *Id.* at 357-58. Given that Clarke had already received a new parole hearing, the case was moot "because no effective remedy could be given." *Id.* at 357.

Szemborski argues that his case is not moot because a resolution of the issues raised in his writ petition, should he succeed, will afford him relief not already achieved by virtue of the subsequent parole hearing. Szemborski relies on *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶¶19-22, 252 Wis. 2d 404, 643 N.W.2d 515, where we concluded that an inmate's claim that the program review committee (PRC) had incorrectly applied its risk assessment was not rendered moot by a subsequent PRC hearing applying the same risk assessment. In *Treat*, we concluded that if the inmate prevailed on his claim of error, he would be entitled not only to a new PRC hearing, but to one that used a different and corrected methodology. *Treat*, ¶¶20-22.

We reject Szemborski's attempt to analogize his facts to those present in *Treat*. Given the nature of Szemborski's alleged error—that the chairperson's decision was arbitrary and unreasonable—a new parole hearing afforded him all the relief to which he was entitled. Unlike the inmate in *Treat*, there is no need to remand Szemborski's petition for further fact finding concerning the chairperson's exercise of discretion. First, even if we were to assume that the chairperson acted unreasonably in 2011, unlike the inmate in *Treat*, Szemborski has not demonstrated that this affected his 2012 parole hearing, or is likely to affect future parole hearings. Second, apart from the mootness issue, Szemborski has not met his burden to demonstrate that the chairperson's decision was arbitrary or unreasonable. Wisconsin has a discretionary parole system and only the parole commission is authorized to exercise that discretion. See *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶7, 246 Wis. 2d 814, 632 N.W.2d 878; WIS. STAT. § 304.06. In determining whether an inmate should be released on parole, the commission considers the factors enumerated in WIS. ADMIN. CODE § PAC 1.06(16). A commissioner's recommendation for release must be made to the chairperson, who has the ultimate authority to make the release decision. See WIS. ADMIN. CODE § PAC 1.07(1). Here, the chairperson provided several reasons for her decision. The reasons were supported by the record and constituted permissible considerations under § PAC 1.06.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals