COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2997

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

STATE OF WISCONSIN EX REL. RICHARD N. NICKL,

PETITIONER-APPELLANT,

V.

JOHN HUSZ, FRED MELENDEZ, ET. AL.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Richard N. Nickl appeals from an order affirming a decision of the Wisconsin Parole Commission to deny Nickl parole and defer his eligibility for further parole review. We affirm.

Nickl was convicted for a murder and an attempted murder that occurred in 1961. He was sentenced to life in prison on the first charge and a consecutive thirty-year term on the second charge. Nickl escaped from custody in 1974 and was apprehended fifteen years later. He received an additional consecutive three-year term for the escape.

This appeal stems originally from a 1995 parole determination. The Commission denied Nickl parole and deferred his eligibility for further parole review to 1999. On certiorari review, the circuit court concluded that the Commission had not given proper consideration to § 304.06(1r), STATS., 1993-94, which provided that the Commission shall grant parole, unless there are overriding considerations not to do so, to any inmate who is eligible for parole and had obtained a high school equivalency diploma while in prison. On remand, the Commission again denied Nickl parole and deferred his next review to the same date in 1999. Nickl again sought certiorari review, and he appeals from the circuit court order affirming the Commission decision. The named respondents are John Husz, who is chairman of the Commission, and Fred Melendez, a member of the Commission.

Nickl first argues that his right to due process was violated. The argument appears to proceed as follows. The United States Supreme Court has held there is no requirement of due process when parole is discretionary, but there is when the statute contains mandatory language restricting the parole board's discretion. *See* ***Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex***, 442 U.S. 1 (1979). Under § 304.06(1r), STATS., Nickl was entitled to parole unless there were overriding circumstances. This is mandatory language restricting the Commission's discretion. Nickl argues that the process he received was inadequate because he was not informed of the evidence used to deny parole,

and the Commission's explanation of why it found overriding circumstances was inadequate, due to the absence of a written statement showing what criteria and evidence were analyzed.

The respondents concede it is an open question whether the parole statute at issue creates a liberty interest. However, they argue instead that even if Nickl had a liberty interest, he received the process he was due. In ***Greenholtz***, the Court gave an indication of what process is due when it wrote: "The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances." ***Greenholtz***, 442 U.S. at 16.

Based on ***Greenholtz***, we agree that Nickl received the process he was due. There is no requirement that an inmate be informed of the evidence used to deny parole. The ***Greenholtz*** opinion expressly rejected such a requirement. ***Greenholtz***, 442 U.S. at 15. There is also no requirement that the respondents provide a written statement showing what criteria and evidence were analyzed. It is enough that he be informed in what respects he fell short of qualifying for parole. The respondents did so in this case by informing Nickl that he had not served sufficient time for punishment due to the "enormity" of his crime; that he posed unreasonable risk to the community because of his prior escape; and that a prior imprisonment for robbery had not prevented subsequent offenses.

Nickl next argues that the Commission somehow acted improperly by changing its practices to provide for a greater length of time between parole reviews. The rules allow for deferral of reconsideration beyond one year if the chairperson approves it in writing, although apparently the Commission has only recently begun to use this authority. *See* WIS. ADM. CODE § PAC 1.06(2).

Nickl's argument appears to be that the Commission must place its decision to begin using this authority in writing. However, Nickl does not provide support for this proposition, and we reject it.

Nickl's next argument is that the four-year deferral in his case violated the *ex post facto* clauses of the state and federal constitutions because the recent, unwritten practice of deferring reconsideration beyond one year was not in effect when he committed the crimes for which he is now sentenced. The burden is on Nickl to establish this violation. *See* ***California Dep't of Corrections v. Morales***, 514 U.S. 499, 510 n.6 (1995).

We conclude that Nickl has not established an *ex post facto* violation because he has not shown that a four-year deferral was not permitted at the time of his crimes. The statutes governing parole and its procedures were brief and did not discuss the question. Nickl relies on ***Tyler v. State Dep't of Pub. Welfare***, 19 Wis.2d 166, 119 N.W.2d 460 (1963), to show that at that time the parole system was operated in accordance with a certain administrative order and manual. He also notes that Tyler's parole was reviewed at annual intervals. However, ***Tyler*** does not say whether this was required by the order or manual. The supreme court took judicial notice of these documents, but they were not included in the parties' briefs or appendices. On this record, we need not consider the remainder of the ***ex post facto*** analysis.

Finally, Nickl argues that he was denied equal protection because the Department no longer considers "rehabilitation" as a factor in parole. We reject the argument because, while not expressly calling it rehabilitation, the Department's criteria for release include factors that are, essentially, a determination of rehabilitation. *See* WIS. ADM. CODE § PAC 1.06(7).

By the Court.—Order affirmed.

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