**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 24, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP155** **Cir. Ct. No. 2013CV3269**

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

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**STATE OF WISCONSIN EX REL. WILLIAM B. BOWERS,**

**PETITIONER-APPELLANT,**

**V.**

**DOUG DRANKIEWICZ, KATHLEEN NAGLE, JUDY SMITH AND ED WALL,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. William Bowers, pro se, appeals the circuit court's order that affirmed, on certiorari review, the decision of the Wisconsin Parole Commission to deny Bowers presumptive mandatory release. Bowers contends that: (1) the mandatory release statute is unconstitutional as applied to him; (2) the

parole commission's decision was unreasonable and unsupported by the evidence because the commission did not consider an independent psychiatric evaluation or other relevant information; and (3) he should have been provided counsel at the presumptive mandatory release hearing under the American with Disabilities Act (ADA). For the reasons set forth below, we reject these contentions. We affirm.

¶2 Bowers was convicted of second-degree sexual assault, and was sentenced to an indeterminate term of twenty years, with a mandatory release date of July 22, 2013. The parole commission held a presumptive mandatory release hearing on May 20, 2013, and denied Bowers release on the grounds that release would pose an unreasonable risk to the public and that his program participation had not been satisfactory. The commission deferred Bowers' case for two years, setting further review in May 2015. Bowers sought certiorari review, and the circuit court affirmed the decision of the commission. Bowers appeals.

¶3 Our review of a decision in a certiorari action is limited to whether the decision was within the agency's jurisdiction, was according to law, was arbitrary or unreasonable, and was supported by substantial evidence. *See* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821. Part of this analysis is whether the agency followed its own rules and complied with due process requirements. *See* ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. We independently review the agency's decision, granting no deference to the decision of the circuit court. *See* ***Anderson-El***, 234 Wis. 2d 626, ¶15.

¶4 Bowers contends, first, that the mandatory release statute, WIS. STAT. § 302.11(1g)(b),[1] is unconstitutional as applied to him. He argues that he was denied substantive due process when the parole commission denied him release by his presumptive mandatory release date because the commission applied an arbitrary standard in denying him release. He contends that he has a liberty interest in parole because § 302.11(1g)(b) mandates parole unless the commission finds grounds to deny release based on protection of the public or the inmate's refusal to participate in necessary treatment. We are not persuaded.

¶5 We held in ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶10, 246 Wis. 2d 814, 632 N.W.2d 878, that "the statute establishing the presumptive mandatory release scheme does not create a legitimate liberty interest in being paroled," and thus does not give rise to due process protections. Bowers asserts that ***Gendrich*** was wrongly decided. He argues that we should overturn language in ***Gendrich*** that allows the parole commission "virtually unlimited" discretion and holds that an untreated sex offender automatically presents an unreasonable risk to the public. However, we are bound by our prior decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court may overrule or modify language from prior decisions of the court of appeals).

¶6 Bowers also contends that the parole commission's decision to deny him release on his presumptive mandatory release date was unreasonable and unsupported by the evidence because the commission failed to obtain an

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

independent psychiatric evaluation to determine Bowers' risk to the public.[2] Bowers argues that the commission acted unreasonably by failing to consider such factors as the availability of treatment and resources to mitigate risk in the community and the intent of the sentencing court. Bowers contends that the reasons relied upon by the commission—that Bowers had a history of sexually assaultive behavior, had poor conduct in the institution, remained an untreated sex offender, and had been referred for an evaluation for civil commitment as a sexually violent person—were unreasonable and represented the commission's will rather than its judgment. Bowers contends that his sexual assaults occurred at a much younger age and the assaults rank on the lower end of a risk scale; that none of his rule infractions establish that he presents an unreasonable risk to the public; that untreated sex offenders have a low recidivism rate; that his referral for a sexually violent person evaluation should not be determinative; and that he has not refused sex offender treatment but rather is on a wait list for that programming. We are not persuaded that the commission's decision was unreasonable or unsupported by the evidence.

¶7 On certiorari review, "we determine whether reasonable minds could arrive at the same conclusion the committee reached. 'The facts found by the committee are conclusive if supported by any reasonable view of the evidence, and we may not substitute our view of the evidence for that of the committee.'"

[2] Bowers also contends that the parole commission erred by denying him release on his presumptive mandatory release date based on his failure to complete sex offender treatment. Bowers argues that he has not refused to participate in treatment as contemplated under WIS. STAT. § 302.11(1g)(b)2. However, regardless of that factual argument, the commission also denied Bowers release on his presumptive mandatory release date as necessary for protection of the public under § 302.11(1g)(b)1., and Bowers has not explained why it was improper for the commission to consider Bowers' progress in sex offender treatment in determining whether his release would pose an unreasonable risk to the public.

***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998) (citation omitted; quoted source and internal quotation marks omitted). Here, as in ***Gendrich***, 246 Wis. 2d 814, ¶13, there is substantial evidence to support the decision that Bowers' release would pose a substantial risk to the public because Bowers remains an untreated sex offender. The evidence in the certiorari record shows that Bowers has not completed sex offender treatment. As we explained in ***Gendrich***, "[n]o matter the reason for his not participating in treatment, a reasonable person could conclude that as an untreated sex offender, [Bowers] poses a substantial risk to the public." *See* ***id.***

¶8 Finally, Bowers contends that, under the ADA, he should have been provided counsel to participate in the presumptive mandatory release hearing. Bowers contends that he has a history of mental, emotional, and cognitive disabilities and thus is entitled to protection under the ADA. He argues that the ADA prohibits his exclusion from participating in the presumptive mandatory release hearing based on his disabilities. However, the record establishes that Bowers did participate in the presumptive mandatory release hearing. Because Bowers has not shown that any accommodation was necessary for him to participate in any program or service based on a disability, he has not shown that he was entitled to any accommodations under the ADA.[3]

*By the Court.*—Order affirmed.

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

[3] Bowers does not contend that inmates are entitled to counsel at presumptive mandatory release hearings.