

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP2421

Cir. Ct. No. 2016CV142

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. JAMIE D. JARDINE,

PETITIONER-APPELLANT,

V.

DEAN F. STENSBERG,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jamie Jardine, pro se, appeals an order upholding the Parole Commission's rejection of Jardine's application for parole. He also

appeals an order denying his motion for reconsideration. He argues: (1) the Commission violated his due process rights by relying on inaccurate factual predicates and failing to state with particularity the reasons for denying the application; (2) the Commission violated the ex post facto provisions of the United States and Wisconsin Constitutions by using laws that were not in effect at the time he committed his crimes; (3) the Commission's decision was arbitrary and capricious; (4) the Commission improperly used the presentence investigation report (PSI) and Jardine's medical records; and (5) the circuit court should have allowed him to call witnesses at the court proceeding to correct the Commission's factual errors. We reject these arguments and affirm the orders.

¶2 Jardine was convicted of attempted first-degree intentional homicide and four counts of first-degree sexual assault arising from a 1993 attack on a massage parlor worker. The victim suffered serious brain injuries and a gunshot wound to her leg. The sentencing court found Jardine "very dangerous" and sentenced him to sixty years in prison.

¶3 The Parole Commission denied Jardine's most recent application for parole, citing three reasons: (1) his program participation had not been satisfactory; (2) release would involve an unreasonable risk to the public; and (3) he has not served sufficient time for punishment. The Commission noted Jardine was previously enrolled in a sex offender treatment program and "subsequently terminated" because he was "in denial, took little responsibility" and was a "disruption to the program," including engaging in "stalking type behaviors." The Commission concluded that "based on the nature and severity of the case and the fact that you have unmet treatment needs it is clear that you continue to present an unreasonable risk and that more time is warranted so as not to depreciate the seriousness of your offending behaviors."

¶4 Jardine's arguments are substantially based on the false assertion that he has a due process right to discretionary parole or to particular additional procedures. Wisconsin's discretionary parole statutes do not create a protectable liberty interest in parole. *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶7, 246 Wis. 2d 814, 632 N.W.2d 878. Lacking a protectable liberty interest, Jardine is not entitled to any due process protections. *See id.*, ¶10. Furthermore, even in jurisdictions that create a reasonable expectation of discretionary parole, the only due process rights that attached are an opportunity to be heard and informing the inmate of why his or her application failed. *Id.*, ¶11. Jardine was given an opportunity to be heard and an explanation of the Commission's decision.

¶5 Jardine identifies no ex post facto violation. His argument is based on the false assertion that the Commission was necessarily applying more recent law when it based its decision in part on his failure to complete sex offender treatment. To the contrary, WIS. ADMIN. CODE § PAC 1.06(7) (1993), specifically allowed the Commission to base its decision in part on whether release would depreciate the seriousness of the offense, whether the inmate demonstrated satisfactory program participation, and whether the inmate posed an unreasonable risk to the public. The reasons given for denying Jardine's application for parole did not require utilization of any laws or regulations that post-dated his offenses.

¶6 Jardine argues the Commission based its decision on inaccurate facts and its decision was arbitrary considering his recent good conduct in prison. The test on certiorari review is not whether a preponderance of the evidence supports the Commission's determinations, but whether reasonable minds could arrive at the same conclusion. *Gendrich*, 246 Wis. 2d 814, ¶12. We will set aside the Commission's decision only if our review of the record convinces us that a

reasonable person acting reasonably could not have reached the decision from the evidence and its inferences. *Id.* Courts do not substitute their own view of the evidence for the Commission's view. *Ottman v. Town of Primrose*, 2011 WI 18, ¶53, 332 Wis. 2d 3, 796 N.W.2d 411. A reasonable person could conclude that Jardine poses an ongoing public risk based on the nature of his offenses and the fact that he has not completed sex offender treatment.

¶7 Jardine contends the treatment program was terminated, explaining his failure to complete treatment. Inmate classification reports in the record support that assertion. However, regardless of the reason for Jardine's failure to complete the program, the Commission could reasonably find his failure to complete treatment poses a substantial risk to the public. *Gendrich*, 246 Wis. 2d 814, ¶13.

¶8 Jardine also complains that the sex offender program he began was terminated and he has been on a waiting list to get into another program. Whether Jardine is allowed to participate in a particular program is decided by the Department of Corrections Program Review Committee, not the Parole Commission. *See* WIS. ADMIN. CODE ch. DOC 302.

¶9 Jardine contends the PSI contains false statements regarding his juvenile record, whether he was removed from his home, whether he committed crimes against his family, and whether he had been on supervision in another state. Any correction of these alleged errors had to be presented to the Commission, not to the reviewing court. Certiorari review is limited to the record on return to the writ. *State ex rel. Irby v. Israel*, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980). In addition, the Commission's decision did not rely on any of these contested statements.

¶10 Jardine next contends the Commission illegally obtained and improperly used the PSI and his medical records. To the contrary, WIS. STAT. § 972.15(5) (2015-16),¹ specifically authorizes use of a PSI for parole consideration. The Commission's responsibilities include considering the applicant's program participation, readiness for release and risks. The PSI and psychological records are probative of those considerations. *See* WIS. STAT. § 304.01(2); WIS. ADMIN. CODE § PAC 1.06(16). Regarding Jardine's medical/psychological records, Jardine has not identified any fact contained in the records that the Commission used in its determination. In fact, Jardine complains that the Commission focused on the nature of his crimes rather than other factors. In addition, at the parole hearing, Jardine did not treat his medical records as confidential and discussed his therapy programs.

¶11 Jardine complains that the certiorari record sent to the circuit court did not include certain documents, particularly those relating to his need for sex offender treatment. The record does contain his Release Plan/Information, which includes his summary of the 1995-96 treatment evaluations:

No need for sex offender treatment. No congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. No OSM IV indicators for deviant sexual behaviors.

Jardine says he noticed documents were missing from the record, and he

notified the Court and the Respondent of the missing documents and identified the missing documents as well as brought it to the RGCI [Red Granite Correctional Institute] records office to locate the missing documents. The

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

missing documents were located and sent directly to the Respondent but these Documents were NEVER sent to Jardine by the Respondent.

Jardine has not demonstrated how he was harmed by this procedure.

¶12 Citing statutes relating to the circuit court's subpoena power and the parties' right to cross-examine witnesses called by a judge (WIS. STAT. §§ 885.01(1) and 906.14(1)), Jardine contends he had the right to present new evidence at the court hearing to correct the Commission's factual errors. A reviewing court on certiorari may not consider matters outside the record on return to the writ. *Irby*, 95 Wis. 2d at 703. Additional facts cannot be added to the record. *State ex rel. Richard v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993). Jardine had two months' notice of the parole hearing. Because the law does not allow the court to take additional testimony on certiorari review, any addition or correction of the record had to occur before the Commission.

By the Court.—Orders affirmed.

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

