COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1657 **Cir. Ct. Nos. 2015CV1369**

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

LARRY GEORGE,

PETITIONER-APPELLANT,

V.

DOUG DRANKIEWICZ AND DEAN STENSBERG,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larry George, pro se, appeals an order affirming, on certiorari review, the Wisconsin Parole Commission's decision to deny George presumptive mandatory release. George also appeals the order denying his motion for reconsideration. George raises several challenges to the Commission's decision. We reject George's arguments and affirm the orders.

BACKGROUND

¶2 George was convicted of second-degree sexual assault with use of force in Brown County Circuit Court case No. 1996CF163, arising from allegations that, on December 31, 1995, he forced a victim to fellate him by use of intimidation and physical assault. On August 13, 2001, George was sentenced to fifteen years in prison, to run consecutively to a sentence he was already serving for a sexual assault conviction in a Winnebago County case. George began serving his Brown County sentence in October 2005. His presumptive mandatory release date—calculated as two-thirds of his Brown County sentence pursuant to WIS. STAT. § 302.11(1) (2015-16)[1]—was October 16, 2015, and his maximum discharge date is October 16, 2020.

¶3 Prior to George's presumptive mandatory release date, the Commission denied his release. On certiorari review, the circuit court affirmed the Commission's decision and denied George's motion for reconsideration. This appeal follows.

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

DISCUSSION

¶4 Our review of the decision in this certiorari action is limited to determining whether: (1) the Commission kept within its jurisdiction; (2) the Commission acted according to law; (3) the Commission's action was arbitrary, oppressive or unreasonable; and (4) the Commission's decision was supported by the evidence. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d 878. Part of this analysis is whether the Commission 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. The prisoner, however, has the burden of proving by a preponderance of the evidence that the Commission's actions were arbitrary and capricious. ***Gendrich***, 246 Wis. 2d 814, ¶4. We independently review the Commission's decision, granting no deference to the decision of the circuit court. *See* ***State ex rel. Anderson–El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821.

¶5 For prisoners such as George, who are sentenced for a serious felony committed between April 21, 1994 and December 31, 1999, the mandatory release date is presumptive. *See* WIS. STAT. § 302.11(1g)(am). The statute governing presumptive mandatory release provides, in relevant part:

> (b) Before an incarcerated inmate with a presumptive mandatory release date reaches the presumptive mandatory release date … the parole commission shall proceed under s. 304.06 (1) [governing paroles from state prisons and house of correction] to consider whether to deny presumptive mandatory release to the inmate. If the parole commission does not deny presumptive mandatory release, the inmate shall be released on parole. The parole commission may deny presumptive mandatory release to an inmate only on one or more of the following grounds:
>
> 1. Protection of the public.

> 2. Refusal by the inmate to participate in counseling or treatment that the social service and clinical staff of the institution determines is necessary for the inmate ….

WIS. STAT. § 302.11(1g)(b).

¶6 The Commission has "virtually unlimited" discretion in making a presumptive mandatory release determination, and the presumptive mandatory release scheme "does not create a legitimate liberty interest in being paroled." ***Gendrich***, 246 Wis. 2d 814, ¶¶9-10. Because an inmate is not entitled to release on his or her presumptive mandatory release date, the inmate is not entitled to any due process protections. ***Id.***, ¶10.

¶7 "The test on certiorari review is the substantial evidence test." ***Id.***, ¶12. Thus, we do not ask whether a preponderance of the evidence supports the Commission's determinations, but whether reasonable minds could arrive at the same conclusion. ***Id.*** 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.

¶8 Here, the Commission provided the following permissible reasons for denying release: (1) George's refusal to participate in sex offender counseling or treatment that the social service and clinical staff determined was necessary; and (2) protection of the public. With respect to the first ground, the Commission noted that George continued to have "an unmet essential treatment need of SO-4 [referring to the Intensive Residential Sex Offender Treatment Program]." An inmate classification report completed just prior to George's parole review indicated that SO-4 is required treatment for George and that he refused the

program in February 2002. Further, in a release plan completed days before his parole review, George continued to refuse SO-4.

¶9 George challenges this ground for denying release, claiming his SO-4 need is based on an outdated evaluation. George contends that a more recent psychiatric evaluation by Dr. Kendall Brown and a Cognitive Group Intervention Program report did not suggest the need for further sex offender treatment. The referenced evaluation and report, however, are not part of the certified record that was before the Commission. Therefore, they may not be considered on certiorari review. *See* ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993) (certiorari is limited to review of the record brought up by the writ and facts cannot be added to that record). There is no evidence in the certified record to support George's contention that SO-4 is not necessary.

¶10 With respect to the second ground for denying release, the Commission determined that George's failure to complete sex offender treatment, for whatever reason, made him a risk to the public, indicating: "Based on the nature and severity of the case and the fact that you have refused programming it is clear that you continue to present as an unreasonable risk …." *See* ***Gendrich***, 246 Wis. 2d 814, ¶13 ("No matter the reason for his not participating in treatment, a reasonable person could conclude that as an untreated sex offender, Gendrich poses a substantial risk to the public."). The Commission also recognized other evidence of risk to the public, including the fact that George had a "significant criminal record" and was on supervision for a separate crime when he committed the underlying offense. The Commission had ample reason to conclude George poses an ongoing public risk.

¶11 George nevertheless asserts the Commission was required to consider his COMPAS[2] risk assessment scores, claiming the Legislature has mandated that the Commission give controlling weight to COMPAS scores when determining whether to grant presumptive mandatory release. As authority for his contention, George cites ***State v. Loomis***, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749; WIS. STAT. §§ 301.48(2g) and 301.068(3)(a); and WIS. ADMIN. CODE §§ DOC 302.14 and 302.15(7) (through Oct. 2017). None of the cited authorities, however, support George's contention.

¶12 In ***Loomis***, our supreme court considered whether a circuit court may rely on COMPAS scores when imposing a sentence. ***Loomis***, 371 Wis. 2d 235, ¶6. The court concluded a sentencing court may consider COMPAS risk assessments subject to certain limitations. ***Id.***, ¶¶98-99. Nothing in that case, however, mandates that the Commission consider COMPAS scores when determining whether to grant presumptive mandatory release.

¶13 Turning to the cited statutes and codes, WIS. STAT. § 301.48(2g) requires the use of a "standard risk assessment instrument" to determine if a global position tracking system is appropriate for certain child sex offenders. WISCONSIN STAT. § 301.068(3)(a) requires the Department of Corrections (DOC) to establish community services that increase public safety and reduce recidivism for offenders identified through the use of "valid, reliable, and objective risk assessment instruments" as having a medium or high risk of recidivism. WISCONSIN ADMIN.

[2] COMPAS—an acronym for Correctional Offender Management Profiling for Alternative Sanctions—is a risk assessment tool designed to provide decisional support for the Department of Corrections when making placement decisions, managing offenders, and planning treatment. *See* ***State v. Loomis***, 2016 WI 68, ¶13, 371 Wis. 2d 235, 881 N.W.2d 749.

CODE § DOC 302.14 requires the DOC to "monitor custody classification, risk rating, institution placement and program or treatment assignments for every inmate." Finally, WISCONSIN ADMIN. CODE § DOC 302.15(7) provides that one of the purposes of program review is to evaluate the inmate's risk. None of the cited statutes or codes mandate that the Commission consider COMPAS risk assessments when determining whether to grant parole.

¶14 George also claims the Commission improperly "rescinded" a previous decision to release him. Based on his assertion that DOC personnel led him to believe that the decision to release him had been made and that he would be released on his presumptive mandatory release date, George asserts he was entitled to review of the rescission. George had no basis to rely upon any statements by DOC personnel regarding his presumptive mandatory release, as the Commission makes the decision whether to grant release. *See* WIS. STAT. § 302.11(1g)(b). In fact, two months before his presumptive mandatory release date, the Commission provided George with a "Notice of Parole Commission Consideration for Presumptive Mandatory Release" indicating the upcoming process for determining whether he would be released. Because there is no evidence in the record to support George's claim that the Commission had granted him release, the Commission's decision to deny release cannot be considered a rescission.

¶15 Citing e-mails between DOC personnel and Parole Commissioner Doug Drankiewicz, George further contends the Commission improperly made the decision to deny release on parole prior to his hearing. In July 2015, DOC personnel asked Commissioner Drankiewicz whether approval of a proposed residence would affect the Commission's parole decision. Commissioner Drankiewicz responded: "The most impactful factor in this decision will be his refusal of programming. As a [presumptive mandatory release], we and he

understand what that decision means and therefore residence approval and [electronic monitoring] are not significant considerations at this time." On its face, the e-mail does not prove a decision regarding George's release was made prior to the hearing. Rather, the e-mail correctly states that George's refusal of programming would be the most important factor in the Commission's decision.

¶16 George alternatively claims the presumptive mandatory release standard is unconstitutionally vague and that the denial of his parole is contrary to public policy. Rather than developing these stated arguments, however, George merely repeats his contention that the Commission's decision was unreasonable. This court need not consider inadequately developed arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶17 The Commission's decision to deny George release on parole was not arbitrary, oppressive or unreasonable. The Commission stated sufficient reasons to deny release, and its decision was reasonable in light of the evidence. We therefore affirm the orders.

By the Court.—Orders affirmed.

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