COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3698

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

STATE OF WISCONSIN EX REL.,
BOBBY L. BRASWELL,

PETITIONER-APPELLANT,

V.

JOHN HUSZ, CHAIRMAN,
WISCONSIN PAROLE COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Bobby L. Braswell appeals from an order denying relief sought in a petition for a writ of certiorari from a decision of the Wisconsin Parole Commission. His various claims of error are not set forth with exact clarity. Nevertheless, we surmise them to raise the following questions: (1) was

his due process liberty interest in a discretionary parole violated? (2) was he denied a fair hearing by the parole commission? (3) was he denied due process when his motion for judgment for a late return of the record was denied? and (4) was he denied due process because he was denied the opportunity to be heard? Because Braswell had no liberty interest in a discretionary parole, because he was not denied a fair hearing, because Braswell suffered no prejudice from the late return, and because he was not denied the opportunity to be heard, we affirm.

I. BACKGROUND

On September 10, 1978, Braswell was convicted of two counts of first-degree homicide, one count of robbery, as party to a crime, and one count of concealing identity, as party to a crime. He received concurrent sentences of life imprisonment for the murder convictions. He received a ten-year prison sentence for the robbery conviction, concurrent to the life sentences, and a five-year prison sentence on the concealing identity charge, consecutive to the robbery sentence.

Braswell applied for discretionary parole pursuant to § 304.06(1)(b), STATS. On December 12, 1996, he appeared before a commissioner of the Wisconsin Parole Commission. In the commission's report, the commissioner found that Braswell had attained statutory parole eligibility, that his institutional adjustment and program participation had been satisfactory, and that he had developed an adequate parole plan. The commissioner concluded, however, that Braswell had not served sufficient time for punishment and that his release at the time would involve an unreasonable risk to the public. The commissioner recommended that Braswell's request for parole be deferred for twenty-four months. On January 31, 1997, the chairman of the Wisconsin Parole Commission approved the twenty-four month deferral.

Braswell filed a petition for writ of certiorari in the circuit court seeking review of the decision of the Wisconsin Parole Commission. The court denied the relief sought. He now appeals.

II. ANALYSIS

The scope of our review on a writ of certiorari is identical to that of the trial court's. It is confined to the record. *See* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). We are not to consider matters outside the record on return of the writ. *See* ***id.*** We review the commission decision, and are limited to determining: (1) whether the commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *See* ***id.*** "The test is whether reasonable minds could arrive at the same conclusion reached by the commission." ***State ex rel. Saenz v. Husz***, 198 Wis. 72, 77, 542 N.W.2d 462, 464 (Ct. App. 1995).

State ex rel. Johnson v. Cady, 50 Wis.2d 540, 185 N.W.2d 306 (1971), further advises:

> "The board is presumed to have had before it information which warranted the order … and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. That burden rests squarely on the prisoner, and if he fails to sustain the burden, the courts will not interfere with the board's decision."

Id. at 550, 185 N.W.2d at 311 (citation omitted).

A. Due Process Liberty Claim.

Braswell's first claim of error is that he had a due process liberty interest in discretionary parole that was violated by the commission. His contention is based on the belief that the applicable statutes and rules create an expectancy of release that is a liberty interest protected by due process. Because this belief is incorrect, his contention of error fails.

In ***Huggins v. Isenbarger***, 798 F.2d 203 (7th Cir. 1986), the United States Circuit Court of Appeals declared, "If parole is discretion[ary] and nothing but, then there is no liberty or property interest." ***Id.*** at 205. Contrary to Braswell's assertion, § 304.06, STATS., which governs paroles from state prisons, is not couched in mandatory language, but in permissive terms. Therefore, it does not create a liberty interest. The key words in the statute are that the "commission *may* parole an inmate." Section 304.06(1)(b) (emphasis added). Similarly, when we examine the Wisconsin Administrative Code, Chapter PAC 1 entitled "PAROLE PROCEDURE," and more particularly, PAC 1.06 and 1.07, we find no language that requires release.

Braswell relies heavily on the language contained in PAC 1.06(7): "A recommendation for parole and a grant of parole shall be made only after" five factors are taken into account.[1] Four of the five factors, however, require only the exercise of informed discretion; i.e. the inmate has:

[1] WIS. ADM. CODE, § PAC 1.06(7) provides:

> A recommendation for parole and a grant of parole shall be made only after the inmate has:
> (a) Become parole-eligible under s. 304.06, Stats., and s. PAC 1.05;
> (b) Served sufficient time so that release would not depreciate the seriousness of the offense[;]
> (c) Demonstrated satisfactory adjustment to the institution and program participation at the institution;

(continued)

> (b) Served sufficient time so that release would not depreciate the seriousness of the offense[;]
>
> (c) Demonstrated satisfactory adjustment to the institution and program participation at the institution;
>
> (d) Developed an adequate parole plan; and
>
> (e) Reached a point at which, in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public.

WIS. ADM. CODE, § PAC 1.06(7) (1995). Each of these factors requires permissive appraisal and evaluation, not mandatory action. Furthermore, as set forth in PAC 1.07(1), after there has been parole consideration under PAC 1.06, the commissioner conducting the hearing *may* recommend parole or *may* deny parole. *See* WIS. ADM. CODE, § PAC 1.07(1) (1995). For these reasons, we conclude there is no due process liberty interest in discretionary parole in Wisconsin.[2]

B. Due Process/Fair Hearing Claim.

Braswell next claims his due process rights were violated because he was not granted a fair hearing. He seems to find fault on the part of the commission for "weighting heavily on the seriousness" of the crimes and making the punishment factor the primary reason for denying him discretionary parole. Of the five criteria or factors to be considered, Braswell satisfied three, but did not satisfy serving sufficient time for punishment or that his release would not involve

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> (d) Developed an adequate parole plan; and
> (e) Reached a point at which, in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public.

[2] Because we have concluded that there is no due process liberty interest in discretionary parole in Wisconsin, we do not address Braswell's claim that his denial of parole was constitutionally deficient. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

an unreasonable risk to the public. In addressing these factors, he complains too much emphasis was given to the punishment criteria. We are not convinced.

A review of the five factors must be considered before a recommendation for parole, or a grant of parole, demonstrates that a judgmental process must take place on the part of the interviewing commissioner and the commission itself. As stated, in reference to discretionary parole under § 304.06, STATS., there is no language mandating a recommendation or a grant of parole. Nor is there any statutory or rule provision prohibiting giving one factor more weight and significance than another as long as all of the appropriate factors are considered. To pass minimum due process muster, there must be a statement of the reasons for the commission's actions

> sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision … and the essential facts upon which the Board's inferences are based.

United States ex rel. Scott v. Illinois Parole & Pardon Bd., 669 F.2d 1185, 1190 (7th Cir. 1982) (citation omitted). The ***Scott*** court continued stating:

> even when the Due Process Clause applies to a parole release determination, there is "nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release."

Id. at 1190-91 (citation omitted). Amplifying, the same court declared that the mere statement of the statutory offense underlying the conviction was not sufficient explication, but consideration of the inmate's specific conduct did

satisfy due process requirements. Here, the interview record quite clearly sets forth consideration of the specific conduct of Braswell and "not just the statutory offense for which he had been found criminally liable." ***Scott***, 669 F.2d at 1191. In addition, the presiding commissioner spent considerable time discussing, in effect, whether Braswell had served sufficient time. For these reasons, there is no basis to conclude he received an unfair due process hearing.[3]

C. Late Record Return.

Braswell next contends he was denied procedural due process when the circuit court denied his motion for judgment on his petition for writ of certiorari because the commission was late in its return. Braswell filed his writ on April 10, 1997. On June 2, 1997, the circuit court signed an order requiring the commission to transmit the return of the record within ninety days after service of the writ. The return was to be made by September 1, 1997. It was not made until September 8, 1997. Braswell filed his motion for judgment on September 9. The circuit court denied the motion. The circuit court was correct in denying the motion.

Braswell cites ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 454 N.W.2d 18 (Ct. App. 1990), as authority for his claim. His reliance on ***Lomax*** is misplaced. ***Lomax*** did not involve a tardy return of the record in a certiorari review, but rather a return of a deficient record making it impossible for this court

[3] Braswell also seems to argue that the commissioner considered factors outside the scope of § 304.06, STATS., and WIS. ADM. CODE PAC 1, i.e. security classification and Choice programs. Our review of the interview record, however, reveals that discussions of these topics were initiated by Braswell in his statements to the commissioner either in a voluntary sense or in response to questions. Therefore, his claim that this information should not have been considered is without merit. *See* ***In re Shawn B.N.***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (we will not review invited error.)

to determine whether proper procedures had been followed. There we did not grant judgment, but remanded to supplement the record. *See* ***id.*** at 740-41, 454 N.W.2d at 21. Here, we fail to comprehend how Braswell's due process rights were violated by the mere seven-day delay.

D. Due Process/Opportunity to be Heard.

Last, Braswell claims he was denied due process because he was deprived of the opportunity to be heard. He claims that the return of the record by the commission failed to include certain documents that Braswell believed were important to his case. On September 17, 1997, he filed a motion to supplement the return and listed the missing documents. He also claims the circuit court should not have ruled on the motion without entertaining argument.

Braswell claims he was entitled to a complete record and the opportunity to be heard. *See* ***State ex rel. Sahagian v. Young***, 141 Wis.2d 495, 501, 415 N.W.2d 568, 571 (Ct. App. 1987). We agree that this general statement constitutes the correct law. Nevertheless, additional circumstances here compel us to reject Braswell's claim.

The circuit court agreed that the listed correspondence was not in the filed return, but opined that without copies of the absent documents, it was unable to rule on supplementing the record. The court was correct in stating it "'cannot go into a review of matters of evidence. [It is] confined to the defects appearing upon the return.'" ***State ex rel. Grant Sch. Dist. v. School Bd.***, 4 Wis.2d 499, 504, 91 N.W.2d 219, 222 (1958). It was Braswell's responsibility to supply the missing correspondence if, in fact, it was part of the record, or to supplement the record if appropriate. His failure to do so compels us to reject his claim.

The second basis for this claim of error is the failure of the circuit court to issue a briefing schedule and to conduct a hearing. Braswell cites no authority for this position and we are unaware of any.[4] We, therefore, reject his claim of error.[5] *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

III. CONCLUSION

In sum, we reject each of Braswell's contentions for the foregoing reasons. Accordingly, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[4] We do note that, in general, Braswell submitted to this court a brief of good substance which, as this opinion reveals, we have carefully reviewed.

[5] Braswell also raises the issue that his rights were violated because the commission treated his concurrent life sentences as consecutive, thus negating the concurrent doctrine. This claim of error was not adequately briefed and we decline to consider it. *See* ***State v Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).