COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3143 **Cir. Ct. No. 98-IP-50**

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

STATE OF WISCONSIN EX REL TAYR KILAAB AL GHASHIYAH (KHAN), F/K/A CASTEEL,

PETITIONER-APPELLANT,

V.

MICHAEL SULLIVAN, DEPARTMENT OF CORRECTIONS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: RAYMOND S. HUBER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Tayr Kilaab al Ghashiyah (Khan) appeals an order affirming the Wisconsin Parole Commission's decision denying him parole. Ghashiyah argues that the Commission: (1) failed to recognize his liberty interest in release on parole; (2) applied an arbitrary standard; (3) denied him due process;

(4) violated the ex post facto rule; and (5) his parole eligibility date was miscalculated. We reject his arguments and affirm the order.

¶2 When the Commission denied parole, it provided the following explanation:

> You have not served sufficient time for punishment, noting that you have approximately 12 1/2 years in on your 50 years of sentence for two counts of Armed Robbery while Concealing Identity. Those offenses occurred shortly after release from prison after serving time for an armed burglary. Your institution adjustment over the years has been marred by quite a few Conduct Reports in which there are approximately 30 Major and 30 Minor Reports. That indicates an individual who is not very easy to supervise. Your Parole Plan to reside with your wife in Kenosha appears to be appropriate. Release would involve an unreasonable risk to the public. Your criminal history reveals an individual who went to prison for Burglary, got out into the community and then became involved in an Armed Burglary and served an additional imprisonment. Shortly after release from prison you then became involved in the two Armed Robberies causing your present 50 years of sentence. That pattern not only of repeated felony misconduct but of crimes escalating in severity indicates the unreasonable risks to the community.

STANDARD OF REVIEW

¶3 On certiorari review, we apply the same standard as the trial court. ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Judicial review is confined to whether: (1) the agency kept within its jurisdiction; (2) the agency acted according to law; (3) its action was arbitrary, oppressive or unreasonable, and (4) the evidence presented was such that the agency might reasonably make the decision it did. ***State ex rel. Jones v. Franklin***, 151 Wis. 2d 419, 425, 444 N.W.2d 738 (Ct. App. 1989).

DISCUSSION

1. Liberty interest

¶4 Ghashiyah argues that the Commission failed to act according to law when it denied him parole because it failed to recognize that WIS. STAT. § 304.06(1r) (1993-94)[1] creates a constitutionally protected liberty interest in release on parole. He urges us to find a protected interest in the mandatory language of § 304.06(1r) (1993-94) under a "mandatory language" test employed in ***Hewitt v. Helms***, 459 U.S. 460, 472 (1983).[2]

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[1] WISCONSIN STAT. § 304.06(1r) (1993-94) was no longer in effect in 1997. Neither party questions the applicability of § 304.06(1r) (1993-94) to a 1998 parole decision. Therefore, we do not address the issue.

All statutory references are to the 1999-2000 edition unless otherwise noted.

[2] This test was called into doubt by the United States Supreme Court in ***Sandin v. Conner***, 515 U.S. 472 (1995), as the D.C. Circuit Court of Appeals explained:

> ***Hewitt v. Helms***, 459 U.S. 460, 103 S. Ct. 864, 74 L.Ed.2d 675 (1983), came to stand for the proposition that a state's "use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the state has created a liberty interest." ***Kentucky Dep't of Corrections v. Thompson***, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989).
>
> Where the Supreme Court stands on this subject is no longer certain. ***Sandin v. Conner***, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), a case dealing with prison disciplinary proceedings, roundly criticized the methodology just described. The ***Sandin*** majority thought the Court had gone astray, particularly in ***Hewitt v. Helms***, when it made liberty interests depend on the "somewhat mechanical dichotomy" between state regulations that were mandatory and those that were discretionary. ***Id***. at ----, 115 S.Ct. at 2298. … "The time has come," the Court said, "to return to the due process principles ... established" before the mandatory-discretionary dichotomy took hold. ***Id***. at ----, 115 S.Ct. at 2300.

(continued)

¶5 Ghashiyah relies on the following phrase found in WIS. STAT. § 304.06(1r) (1993-94): The "parole commission shall grant release on parole, unless there are overriding considerations not to do so, to any inmate who is eligible for parole" who meets certain conditions relating to literacy and obtaining a high school education.

¶6 We are unpersuaded. To create a constitutionally protected liberty interest, a state law or administrative rule affecting liberty must employ "language of an unmistakenly mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed ... and that [the challenged action] will not occur absent specified substantive predicates ….'" ***Robinson v. McCaughtry***, 177 Wis. 2d 293, 300, 501 N.W.2d 896 (Ct. App. 1993) (citation omitted).

¶7 In general, Wisconsin's parole system provides for both a discretionary parole scheme and a mandatory parole scheme. ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶7, 246 Wis. 2d 826, 632 N.W.2d 878. Wisconsin's discretionary parole scheme[3] does not create a protectible liberty interest in parole. ***Id.*** On the other hand, Wisconsin's mandatory parole scheme[4] does create a protectible liberty interest. ***Id.***

Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996).

[3] For example, WISCONSIN STAT. § 304.06(1)(b) provides for a discretionary scheme: "[T]he parole commission may parole an inmate of the Wisconsin state prisons ... when he or she has served 25% of the sentence imposed for the offense, or 6 months, whichever is greater." (Emphasis added.)

[4] WISCONSIN STAT. § 302.11(1) provides for a mandatory scheme: "The warden ... shall keep a record of the conduct of each inmate, specifying each infraction of the rules. ... [E]ach inmate is entitled to mandatory release on parole by the department [of corrections]. The mandatory release date is established at two-thirds of the sentence." (Emphasis added.)

¶8 Ghashiyah contends that the phrase "shall grant release" is unmistakenly mandatory in character. *See* WIS. STAT. § 304.06(1r) (1993-94). Ghashiyah takes this phrase out of context. Unlike the mandatory parole provisions of WIS. STAT. § 302.11, which apply after an inmate has served two-thirds of his sentence, § 304.06(1r) (1993-94) provides that the parole commission "shall" parole an inmate if certain conditions are met and "unless there are overriding considerations not to do so." The Commission's determination whether there are overriding considerations is a discretionary exercise. Consequently, the discretionary decision contained in § 304.06(1r) (1993-94) is insufficient to create a protected liberty interest.

2. Arbitrary standard

¶9 Ghashiyah argues that the Commission failed to act according to law because it invented an arbitrary standard to determine that he had not satisfied its amorphous criteria for punishment. He asserts that once the inmate has served the applicable percentage of his sentence, the punitive objectives have been satisfied. He claims that he was eligible under WIS. STAT. § 304.06(1)(b) and satisfied the statutory criteria under WIS. STAT. § 304.06(1r) (1993-94). He argues that his parole plan was appropriate and the trial court erroneously sustained the Commission's rationale that Ghashiyah's release would involve an unreasonable risk to the public because of his pattern of repeated felonious activities of escalating severity.[5] He further claims that the Commission failed to give fair consideration of the applicable criteria.

[5] Ghashiyah's argument fails to provide adequate record references contrary to WIS. STAT. RULE 809.19(1)(e).

¶10 The record fails to support Ghashiyah's contentions. The Commission stated a number of reasons for its denial of parole, including that his release would involve an unreasonable risk to the public. *See* WIS. ADMIN. CODE § PAC 1.06(7) ("[A] grant of parole shall be made only after the inmate has: … reached a point at which, in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public.").

¶11 Although the Commission considered that Ghashiyah presented an appropriate parole plan, it concluded that this factor was outweighed by other serious factors. The Commission explained that it based its decision on the length of his incarceration, the pattern of additional offenses after release, their escalating severity and his conduct while incarcerated. These are permissible considerations under WIS. ADMIN. CODE § PAC 1.06(7).

¶12 Ghashiyah complains that the parole board may not consider the punitive aspect of his sentence, because he had reached his parole eligibility date, citing ***Block v. Potter***, 631 F.2d 233 (3rd Cir. 1980).[6] Ghashiyah fails to identify any conduct by the Commission that might give rise to a cognizable substantive due process violation under ***Block***—e.g., deprivations implicating "race, religion, political beliefs, or on frivolous criteria with no rational relationship to the purpose of parole such as the color of one's eyes, the school one attended, or the style of one's clothing." ***Block***, 631 F.2d at 236 n. 2.

[6] The vitality of ***Block v. Potter***, 631 F.2d 233 (3rd Cir. 1980), is questionable, *see* ***Jubilee v. Horn***, No. 97-1755, slip op. at 1 (3rd Cir. Mar. 26, 1998) (unpublished per curiam decision) ("[N]ot only do courts of appeals in other circuits disagree with ***Block***, but more recent decisions by this Court suggest that ***Block*** may be obsolete.").

¶13 Ghashiyah offers no legal authority that punishment may not be considered. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Under WIS. ADMIN. CODE § PAC 1.06(7)(b), a grant of parole shall be made only after an inmate has "[s]erved sufficient time so that release would not depreciate the seriousness of the offense." The Commission's reliance on the punishment factor implies its consideration of the sufficiency of time served so that release would not depreciate the seriousness of the offense. Because this is an appropriate factor under § PAC 1.06(7)(b), Ghashiyah fails to demonstrate that the standards the Commission employed were arbitrary.

¶14 Ghashiyah further argues that the Commission unreasonably disregarded abundant information favorable to his parole application. We disagree. The Commission's decision reflects favorable consideration of his plan to live in Kenosha with his wife, but unfavorable considerations outweighed it. The Commission's balancing of factors is not arbitrary or unreasonable.

¶15 Ghashiyah also argues that the Commission's actions stem from its own vindictiveness. We are unpersuaded. The record reflects a reasoned application of appropriate factors. Accordingly, no grounds for reversal are shown.

3. Due process violation

¶16 Ghashiyah argues he was denied due process because the Commission failed to provide a proper written notice of the factors it planned to consider. He further argues that form DOC 1204 was inadequate because it failed to list the factors.

¶17 Ghashiyah relies on ***State ex rel. Staples v. DHSS***, 128 Wis. 2d 531, 534, 384 N.W.2d 363 (Ct. App. 1986) (due process required security director to state reasons for reclassifying minor offense to major offense). This case does not support the proposition Ghashiyah asserts, that due process requires the notice of a parole hearing to recite criteria for release on parole. In any event, the same court revisited ***State ex rel. Staples v. DHSS*** a year later and determined that it had initially erred. *See* ***State ex rel. Staples v. Young***, 142 Wis. 2d 348, 418 N.W.2d 333 (Ct. App. 1987) (security director's failure to state reasons did not implicate due process rights).

¶18 Ghashiyah also cites ***State ex rel. Tyznik v. H&SS Dept.***, 71 Wis. 2d 169, 170-174, 238 N.W.2d 66 (1976), where the petitioner claimed that he was denied due process because prior to his parole hearing he was not informed of the standards to be used by the board in reaching its decision. ***Tyznik*** is inapposite. The record in ***Tyznik*** reflected a lack of criteria and the case was remanded for the development and promulgation of parole standards within sixty days of the date of remand. ***State ex rel. Clarke v. Carballo***, 83 Wis. 2d 349, 353-54, 265 N.W.2d 285 (1978). Here, the procedures and criteria have been promulgated in WIS. ADMIN. CODE § PAC 1.06.

¶19 The record discloses that Ghashiyah received form DOC 1204, which contained a notice that he was statutorily eligible for parole and that his interview would be held in September 1998. Ghashiyah provides no legal authority for his argument that the notice denied him due process for failing to contain the criteria to be considered by the commission in reviewing an inmate for parole. We do not develop his argument for him. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶20 Next, Ghasiyah argues that he was denied due process because the Commission failed to provide adequate reasons for its decision. The record fails to support this contention. "To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all." ***Solomon v. Elsea***, 676 F.2d 282, 286 (7th Cir. 1982). "For this essential purpose, detailed findings of fact are not required, provided the (Commission'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 (Commission's) inferences are based." ***Id.*** (citations omitted). The statement of reasons given to Ghasiyah meets this standard. The record reflects adequate reasoning and consideration of appropriate factors and discloses no due process violation.

¶21 Ghashiyah further contends that the board failed to provide him with appropriate reasons for its decision and was required to focus exclusively on whether the person completed an education program and whether the board was satisfied the person had adequate plans for suitable employment or otherwise to sustain himself. We reject this argument. The plain language of the statute Ghashiyah cites requires the Commission to consider "overriding considerations." *See* WIS. STAT. § 304.06(1r) (1993-94). It contains no requirement that the Commission focus exclusively on the education program and employment.

4. Ex post facto violation

¶22 Next, Ghashiyah claims that the Commission's forty-eight-month deferral violates due process and the ex post facto clause. This argument lacks appropriate citation to controlling legal precedent and is inadequately developed.

It is not this court's job to supply legal research and argument to an appellant who raises unsupported claims. *See* ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Consequently, his argument is rejected.[7]

¶23 Intertwined with this argument, Ghashiyah also claims that there is no authority to defer his reconsideration for parole forty-eight months. To the contrary, WIS. ADMIN. CODE § 1.06(2) provides that "Reconsideration shall not be deferred for longer than 12 months except with the written approval of the chairperson or the chairperson's designee." Here, the Commission's chairperson explicitly approved the forty-eight-month deferral in writing.

5. Miscalculation of parole eligibility date

¶24 Ghashiyah argues that the miscalculation of his parole eligibility violates his constitutional rights and that the trial court erred by concluding that the issue was not properly raised. It is questionable whether this claim is properly before us because certiorari review is of the Commission's decision denying parole, not the calculation of the eligibility date. Also, as the circuit court noted, the issue is rendered moot by his denial of parole. *See* ***City of Racine v. J-T Enters. of Amer., Inc.***, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974).

¶25 In any event, Ghashiyah's argument fails to contain adequate record citations, *see* WIS. STAT. RULE 809.19(1)(e). "[W]e decline to embark on our own search of the record, unguided by references and citations to specific testimony, to

[7] In any event, WIS. ADMIN. CODE § PAC 1.06(2), providing no deferral of reconsideration longer than twelve months except with written approval of chairperson or designee is in all material respects unchanged from former WIS. ADMIN. CODE § HSS 30.05(2) (1981).

look for … evidence to support [the argument]." ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (citation omitted). WISCONSIN STAT. RULE 809.19(1)(e) requires parties' briefs to contain citations to the parts of the record relied on. We have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument …. [I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." ***Id.*** Accordingly we do not review this contention.

By the Court.—Order affirmed.

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