

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2004

Cornelia G. Clark
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. 04-0349
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000183

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. THOMAS L. ANDERSON,

PETITIONER-RESPONDENT,

v.

**STATE OF WISCONSIN PAROLE COMMISSION AND STATE
OF WISCONSIN DEPARTMENT OF CORRECTIONS,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Lincoln County:
J. MICHAEL NOLAN, Judge. *Reversed.*

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

¶1 PER CURIAM. Thomas Anderson sought certiorari review of the State of Wisconsin Parole Commission's decision to deny him presumptive

mandatory release. The circuit court ordered Anderson's release pursuant to WIS. STAT. § 302.11.¹ The State of Wisconsin appeals the order. It argues that the Commission stated sufficient reasons to deny Anderson presumptive mandatory release and its decision was reasonable in light of the evidence. Because the record reflects the Commission acted in accordance with WIS. STAT. § 302.11(1g)(b)1, and within its discretion, we reverse the circuit court's order.

¶2 In September 1994, Anderson was convicted of second-degree sexual assault of a child and sentenced to ten years' imprisonment. At the time of his conviction, the presumptive mandatory release scheme was in effect. *See State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶8, 246 Wis. 2d 814, 632 N.W.2d 878. In August 2001, the Commission held a hearing to consider Anderson for a presumptive mandatory release date of November 1, 2001. It denied Anderson release for protection of the public, explaining:

You are confined for sexually assaultive behavior and has [sic] a history of juvenile adjudications for other sexually assaultive behavior as well. While you were able to successfully complete your SOT programming while at CCI, you have not completed your Level 5D AODA program. You were terminated from the MICA [Mental Illness Chemical Abuse] program and will need to return to the program and successfully complete it. During the interview today you vacillated about your return to the program indicating first that you wanted to get back into it and then stating that the program is "a crock" and that you will not be able to complete it as it is "too structured" a program for you. It is that degree of structure that you precisely need. Given your offense history, without completion of all your treatment programs including MICA, the risk of your release is unreasonable. It will now be up to you to convince the MICA staff that you are ready to give the program another try. I also caution you on your

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

conduct. A recent major conduct report is noted and you cannot afford to get involved in further misconduct if you want to complete your program successfully and do what you can to earn a release prior to your maximum discharge date. (Emphasis added.)

¶3 Anderson's next presumptive mandatory release review occurred in August 2002, and was also denied on the ground of public protection, with the following explanation.

Since your last review, your conduct continues to be an issue of concern. You're [sic] accumulated two majors and four minor conduct [reports]. The last major occurred in 08/01 for disobeying orders and disruptive conduct. This resulted in 120 [days' program segregation]. Your conduct will need to improve substantially, as this impacts on your risk to the community.

... During your last review, you were informed that you'd needed to successfully complete AODA — Level 5D. It appears that you were terminated for disciplinary reasons from the MICA prgm. You were encouraged [to] address this issue and convince the MICA staff that you're ready to give the prgm another try. However, it's noted from your PRC papers in 02/02 that you don't feel that AODA — Level 5D is appropriate and would be willing to do another AODA prgm, but not the MICA prgm. At your hrg, you commented that you were told by the MICA staff that you need to remain conduct rept free for 90 dys and they'll then consider your re-enrollment in the prgm. Further, you indicated that there are some legal matters pending that may impact on your ability to re-enter the prgm. Whatever the case, you'll need to satisfactorily complete AODA — Level 5D. (Emphasis added.)

¶4 In August 2003, Anderson's most recent parole consideration hearing took place and his presumptive mandatory release was once again denied. The Commission reviewed Anderson's conviction, sentence, treatment and programs, and noted that "you have failed to successfully complete AODA level 5D programming." It reiterated:

Prior parole interviews have addressed your need to complete this program and you acknowledged that you had

an opportunity to enter this program in [January] but declined because you were awaiting possible court action on your sentence. You point this out in support of your stance that you are not refusing the program.

A review of your file clearly demonstrates a need for AODA programming and your inability to complete this identified program indicates that you continue to pose an unreasonable risk and, therefore, you will be retained until your maximum discharge date for the protection of the public. (Emphasis added.)

¶5 Anderson sought certiorari review of the Commission’s decision to deny him presumptive mandatory release. The circuit court concluded that the Commission erroneously relied on the ground set out in WIS. STAT. § 302.11(1g)(b)2, “Refusal by an inmate to participate in counseling or treatment” The court determined, as a matter of law, that Anderson did not refuse to participate in counseling or treatment because while he did not complete the program, he participated in it for approximately ten months. The court ordered Anderson’s release. The State appeals the order.

¶6 On certiorari review, our review is identical to that of the circuit court. *Gendrich*, 246 Wis. 2d 826, ¶4. The reviewing court is limited to determining whether (1) the Commission kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence presented was such that the Commission might reasonably make the order or determination in question. *Id.*

¶7 The State contends that the trial court erroneously overturned its decision. We agree. WISCONSIN STAT. § 302.11 permits the Commission to deny presumptive mandatory release to otherwise eligible prisoners when, in its discretion, the prisoner either poses a risk to the public or refuses to participate in

necessary counseling and treatment. *Gendrich*, 246 Wis. 2d 826, ¶10. The record discloses that the Commission denied Anderson relief because of the risk he posed to the protection of the public. This is a proper ground under § 302.11(1g)(b)1, which provides in part:

(am) The mandatory release date established in sub. (1) is a presumptive mandatory release date for an inmate who is serving a sentence for a serious felony committed on or after April 21, 1994, but before December 31, 1999.²

(b) Before an incarcerated inmate with a presumptive mandatory release date reaches the presumptive mandatory release date specified under par. (am), the parole commission shall proceed under s. 304.06 (1) 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

¶8 Here, the Commission referred to its previous denials of release and recounted the nature of the offense, Anderson’s previous assaultive history, his conduct reports, and that he was unable to complete his AODA program as a basis for its determination that he remained a risk to the protection of the public. Consequently, the record reflects that the Commission acted within its jurisdiction, according to law, within the bounds of reason and that its determination was

² It is undisputed that Anderson was convicted of a “serious felony” within the meaning of the statute.

supported by a reasonable view of the evidence. Consequently, the circuit court's order must be reversed.

¶9 Anderson argues, nonetheless, that the Commission misconstrued WIS. STAT. § 302.11(1g)(b)2 because it required him to complete the AODA program, while the statute merely refers to "participate." He contends that he participated in all the required programming. He claims that he was not incarcerated for an alcohol or drug-related crime. He argues, in effect, that the Commission's determination was arbitrary and not in accordance with law. We are not persuaded.

¶10 The Commission provided ample explanation that it relied on protection of the public, WIS. STAT. § 302.11(1g)(b)1, when it denied Anderson presumptive mandatory release. The Commission considered the nature of the offense, Anderson's assaultive history, his conduct reports and his inability to complete the AODA program in reaching its determination. Contrary to Anderson's contentions, the record reveals that the Commission did not deny his release based solely on his failure to complete the AODA program. Rather, Anderson's failure to complete programming was just one factor in its determination that he posed a risk to the protection of the public. Thus, the record reflects that the Commission acted in accordance with § 302.11(1g)(b)1 and within its discretion. Therefore, Anderson has demonstrated no grounds for relief.

¶11 Anderson also points to the significant progress he has achieved while in prison and his commitment to remain crime free upon release. Anderson is to be commended for his progress, his participation in the program, and his desire to become a productive law-abiding member of the community. Under WIS. STAT. § 302.11, however, the determination whether Anderson is entitled to

presumptive mandatory release is within the Commission's discretion, not the court's. Under the narrow scope of review afforded to the court, the Commission's decision must be sustained. See *Gendrich*, 246 Wis. 2d 826, ¶¶4, 12.

By the Court.—Order reversed.

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