

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 6, 2001

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.

No. 00-3492

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. HARLAN RICHARDS,

PETITIONER-APPELLANT,

V.

**JERRY SMITH, CHAIRPERSON, WISCONSIN PAROLE
COMMISSION,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Harlan Richards appeals from an order affirming a parole commission decision to deny him discretionary parole. Jerry Smith, chairperson of the board, made the decision on its behalf. Richards contends that Smith did not follow the law, made an arbitrary and capricious decision

unsupported by facts of record, and violated his constitutional protections. We disagree and affirm.

¶2 In 1984, Richards began serving a life sentence on a first degree murder conviction, with dangerous weapon and repeater enhancers. He previously served five years in prison for manslaughter. He became eligible for discretionary parole in 1996.

¶3 At the February 2000 hearing on Richards' parole application, he presented favorable evidence concerning his rehabilitation in prison and his chances for success on parole.¹ However, Smith denied parole upon concluding that Richards remained a threat to the public, and had not served sufficient time in prison, as a person responsible for taking two lives. Among Smith's comments at the parole hearing were "life means life. Unless in our judgment we see fit so why should I see fit when there's two people gone?" He added that Richards was still a threat "because you've got two people that aren't here no more." Smith stated no other reasons for his decision.

¶4 A parole determination is subject to certiorari review. *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980). Our review on certiorari is limited to: (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

¹ While in prison Richards graduated from college *summa cum laude*. He has a prison record free of conduct reports and has completed rehabilitation programs. He also presented letters of recommendation and an offer of employment upon release.

evidence was such that it might reasonably make the order or determination in question. *Id.*

¶5 Parole is a matter of privilege, resting within the paroling authority's discretion. *Id.* at 587. The parole commission's discretion in Wisconsin is guided by WIS. ADMIN. CODE § PAC 1.06(7), providing:

(7) 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;

(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.

¶6 Richards contends Smith acted arbitrarily and in violation of Richards' due process rights by denying parole on the record before him. We disagree. WISCONSIN ADMIN. CODE § PAC 1.06(7) sets forth the criteria for parole, all of which the inmate must meet. The first is statutory, and the rest are left to the parole commission's judgment. It is neither arbitrary nor unreasonable to conclude that a first-degree murder committed by a repeat offender, with a prior manslaughter conviction, is unduly depreciated by release after fifteen years on a life sentence. The same may be said of Smith's judgment that Richards remains a threat to the public, based on his prior acts of murder and manslaughter, even after fifteen years in prison. Although Richards forcefully asserts that he was unfairly convicted of murder, a jury determined otherwise. He cites no authority for the

proposition that the parole commission must disregard the verdict, which has been upheld in numerous postconviction proceedings.

¶7 Richards also contends Smith violated his double jeopardy protection by partly basing parole denial on the prior manslaughter conviction. Government action violates a person's double jeopardy protection if it punishes that person twice for the same act. *State v. Kurzawa*, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994). Richards cannot reasonably contend that denial of discretionary parole is punishment because even parole revocation is not deemed punishment for double jeopardy purposes. *Burke v. Goodrich*, 154 Wis. 2d 347, 353, 453 N.W.2d 497 (Ct. App. 1990).

¶8 Nor did Smith's decision constitute an ex post facto application of the law. Richards contends that Smith's comment at the parole hearing that "life means life" demonstrates Smith was unconstitutionally applying the much stricter parole eligibility standards for first-degree murderers enacted after his conviction. We disagree. Smith stated that "life means life" unless the parole commission grants discretionary parole. That was a correct statement of law under which Richards was convicted: he received a life sentence, subject to discretionary release on parole after eleven years, three months.

¶9 Finally, Richards contends Smith should have ordered a pre-parole investigation report to verify the information Richards presented. Such reports were not required by statute or parole commission rules. In addition, Richards was not denied parole because of a lack of verification of the information Richards provided.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5
(1999-2000).

