COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2604 **Cir. Ct. No. 02CV3462**

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

STATE EX REL. ROBERT DE. MALLORY,

PETITIONER-APPELLANT,

V.

WISCONSIN PAROLE COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Robert Mallory appeals a circuit court order affirming the decision of the Wisconsin Parole Commission to deny him discretionary parole. He contends that the decision was arbitrary and capricious, he was not afforded due process because he was denied access to his parole hearing, and the application of WIS. ADMIN. CODE § PAC 1.06(3)(b) to his

sentence violates the constitutional prohibition against ex post facto laws. We disagree and affirm.

BACKGROUND

¶2 In 1974 Mallory was convicted as a party to a crime of first-degree intentional homicide for the murder of an off-duty police officer in the course of an attempted robbery. He was sentenced to serve a term of life plus fifteen years. According to his brief, since 1985 he has annually attended parole hearings and has been denied discretionary parole every time.

¶3 On July 29, 2002, the Commission denied Mallory parole and deferred consideration for twelve months. The stated grounds for the decision were that Mallory had not served sufficient time for his offense and that Mallory still presented an unreasonable risk to the community. The circuit court affirmed the Commission's decision.

DISCUSSION

¶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 evidence was such that it might reasonably make the order or determination in question. ***Id.*** The second inquiry—whether the Commission acted according to law—includes the questions of whether it afforded due process and whether it followed its own rules. ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 286 N.W.2d 357 (1980). In conducting the fourth inquiry, we determine only whether

any reasonable view of the evidence supports the decision. ***Nufer v. Village Bd. of Village of Palmyra***, 92 Wis. 2d 289, 301, 284 N.W.2d 649 (1979).

¶5 The Commission argues that this controversy is moot because Mallory has since been considered and again rejected for parole. However, we may choose to address issues that are moot if they are capable of repetition but evade review. ***State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County***, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983). The State acknowledges that most parole applications are considered yearly, and therefore a subsequent parole review will usually take place before judicial review of the previous decision is complete. We therefore choose to address the issues Mallory raises.

¶6 Mallory first contends that the Commission's decision was arbitrary and capricious for two reasons: (1) the Commission decided he had not served sufficient time for his crime, and (2) it decided he was still a threat to society. We conclude that the Commission's decision was not arbitrary and capricious.

¶7 Mallory has served approximately thirty years of his sentence of life plus fifteen years. The Commission could reasonably decide that this was not sufficient time for the serious crime of party to the crime of murder of a police officer in the course of an attempted robbery.

¶8 The Commission decided Mallory was still an unreasonable risk to society because his behavior had necessitated a transfer to Wisconsin Secure Program Facility (formerly "Supermax"). The record shows that Mallory was transferred there from a minimum security facility because of his involvement in a prison riot and other disruptive behaviors. This is a reasonable basis on which to conclude that Mallory is still an unreasonable risk to society.

¶9 Mallory next contends that he was denied due process because, he asserts, he was not allowed to attend his parole hearing. We disagree. To determine whether the procedural protections of the due process clause apply, we first analyze whether there is an interest protected by that clause—in this case, a liberty interest. ***Greenholtz v. Inmates of Nebraska Penal & Corr. Complex***, 442 U.S. 1, 11 (1979). The due process clause itself does not create a liberty interest in parole. ***Id.*** Furthermore, when a state enacts a parole system, the Constitution does not require the state to have specific parole procedures, such as an interview. *See* ***id***. at 13. Although state law may, if framed in mandatory language, create a liberty interest in parole, under Wisconsin law parole is committed to the discretion of the Commission. *See* WIS. STAT. § 304.06(2)(b) (2001-02).[1] In addition, there is no regulation that entitles Mallory to be present at the parole hearing. WISCONSIN ADMIN. CODE § PAC 1.06(3)(b) states that "an inmate may be considered for parole, upon notice as provided in par. (c) without an interview, unless the inmate provides the commission … with a written request for an interview." Mallory does not claim that he was not given proper notice of the hearing nor does he assert that he submitted a written request for an interview.

¶10 Finally, Mallory contends that the application of WIS. ADMIN. CODE § PAC 1.06(3)(b) to his sentence violates the prohibition against ex post facto laws embodied in the Due Process Clause of the United States Constitution.[2] Ex post

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

[2] The Wisconsin Constitution also prohibits ex post facto laws. *See* WIS. CONST. art. I, § 12.

(continued)

facto laws include laws passed after the commission of an offense that criminalize conduct that was innocent when committed and increase the penalty for that conduct. *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 512-13, 509 N.W.2d 712 (1994). Presumably this is the basis for Mallory's challenge to WIS. ADMIN. CODE § PAC 1.06(3)(b).

¶11 Federal courts have held that regulatory procedural changes do not violate the ex post facto prohibition of the United States Constitution if the law governing parole remains unchanged. *See, e.g.,* ***Bailey v. Gardebring***, 940 F.2d 1150, 1156 (8th Cir. 1991). Applying this analysis, we conclude that WIS. ADMIN. CODE § PAC 1.06(3)(b) does not violate the prohibition against ex post facto laws. This regulation does not change the Commission's statutory authority to grant parole within its discretion[3]; rather, it provides the procedure the Commission has decided to follow in exercising its discretionary authority.

By the Court.—Order affirmed.

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

The Commission argues that Mallory has waived the ex post facto issue because in the circuit court he did not expressly state that WIS. ADMIN. CODE § PAC 1.06(3)(b) violates the prohibition against ex post facto laws. However, Mallory did assert an ex post facto violation in his trial brief, and we therefore address this issue.

[3] Wisconsin had a discretionary parole system when Mallory was convicted in 1974 under WIS. STAT. § 57.06(1)(a) (1973). This system remains today under WIS. STAT. § 304.06(1)(b).