

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2009

David R. Schanker
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. 2009AP366

Cir. Ct. No. 2008CV981

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. RICHARD L. PATRICK,

PETITIONER-APPELLANT,

v.

**ALFONSO GRAHAM, CHAIR, WISCONSIN PAROLE COMMISSION AND
STEVEN LANDREMAN, WISCONSIN PAROLE COMMISSION,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Richard L. Patrick, *pro se*, appeals an order of the circuit court affirming the decision of the Wisconsin Parole Commission to deny Patrick release on his mandatory parole date. Because the record supports the Commission's decision, we affirm.

¶2 The underlying facts are undisputed. Patrick is serving a fourteen-year sentence for two counts of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (1997-98).¹ The victim was Patrick’s stepdaughter, who became pregnant as a result of the assaults. Patrick was sentenced on February 24, 1999. Under WIS. STAT. § 302.11(1g), Patrick’s crime was a “serious felony,” and Patrick’s mandatory release date of February 13, 2008 was a presumptive mandatory release date. *See* WIS. STAT. § 302.11(1g)(am).

¶3 Under the statutory scheme of WIS. STAT. § 302.11(1g), the Commission gives an incarcerated inmate such as Patrick a parole hearing prior to his presumptive mandatory release date. *See* § 302.11(1g)(b). The Commission may deny mandatory release to otherwise eligible prisoners when, in its discretion, it concludes that the prisoner either poses a risk to the public or refuses to participate in necessary counseling and treatment. *See* § 302.11(1g)(b)1, 2; *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶10, 246 Wis. 2d 814, 632 N.W.2d 878.

¶4 Sex offender treatment (SOT) was identified as one of Patrick’s rehabilitative needs. In 2004, Patrick requested and obtained a transfer to a correctional institution where SOT was an available program. In August 2005, Patrick was given a questionnaire to complete as part of the initial SOT placement process. In the questionnaire, Patrick was asked: “Do you want to be considered for SOT at this time?” to which Patrick responded: “Yes, even though I was denied 35 times the past 7 years to be treated, or even considered. Why now?”

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The questionnaire also asked if Patrick had “any pending legal action regarding [his] sexual assault convictions” and, if so, “what is the nature of the legal action?” Patrick responded: “I have an upcoming civil case against WI Parole, because I feel that I will get better treatment from an outside source other than WI Psy.D. I don’t have any faith in WI DOC treatment programs after being turned away for 7 years.”

¶5 On August 30, 2005, the SOT Treatment Provider informed Patrick that she had “completed interviews” for the upcoming SOT group, that Patrick was “no longer under consideration for participation in this group,” and that his “name will remain on the waiting list for future consideration.” After Patrick completed the questionnaire, he was “coded” as refusing or denying the need for treatment.

¶6 After a presumptive mandatory release parole hearing on December 13, 2007, the Commission denied Patrick parole. The Commission cited both protection of the public and Patrick’s refusal to participate in counseling or treatment that institution staff deemed necessary. Specifically, the Commission stated:

You sabotaged a previous opportunity to enroll in your only essential/offense-related program need of [SOT], after presenting to program staff with a negative/sarcastic attitude. In response to some written questions, you stated “I have an upcoming civil case against WI Parole, because I feel that I will get better treatment from an outside source other than WI Psy. D. I don’t have any faith in WI DOC treatment programs.” You were coded as “refuses/denies need” as a result, and this code remains to date. You contend that you are not refusing program and are being denied enrollment, and the Commission can only point to the fact that you are responsible for creating this roadblock. As a convicted sex offender who has been resistant to [SOT] programming in the past and who continues to be untreated, you are viewed as a continued risk to the

community. Therefore, the Commission orders that you remain confined for further protection of the public.

Patrick sought certiorari review of that decision, and, as noted above, the circuit court affirmed the Commission.

¶7 This court's standard of review of the Commission's decision is identical to that of the circuit court. *Gendrich*, 246 Wis. 2d 814, ¶4. Our review is 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.

Id. Additionally, “[t]he prisoner has the burden of proving by a preponderance of the evidence that the actions of the Commission were arbitrary and capricious. If the prisoner fails to sustain the burden, this court will not interfere with the Commission’s decision.” *Id.* (citations omitted).

¶8 Patrick’s appellate arguments are largely conclusory. He states he had requested SOT for seven years before the 2005 questionnaire but had been denied treatment. Patrick asserts that the continued denial of treatment is not based on his questionnaire answer but rather is a retaliatory action by one of the Commission members against whom Patrick has lodged numerous complaints. Patrick contends that he is not a threat to the community, pointing out that he has no history of sexual assault, other than this conviction. Patrick asserts that the Commission’s decision is arbitrary and capricious because he has completed the other steps necessary for parole consideration.

¶9 Patrick’s appellate arguments boil down to a challenge to the sufficiency of evidence to support the Commission’s decision. “The test on certiorari review is the substantial evidence test.” *Id.*, ¶12.

The test is not whether a preponderance of the evidence supports the Commission’s determinations, but whether reasonable minds could arrive at the same conclusion reached by the Commission. Moreover, when reviewing the record, we look for evidence which supports the decision made by the Commission, not for evidence which might support a contrary finding that the Commission could have made, but did not. We will set aside the Commission’s decision to deny parole only if our review of the record convinces us that “a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.”

Id. (citations omitted).

¶10 Under that standard of review, we must affirm the Commission’s decision. It is undisputed that Patrick has not participated in any SOT during his incarceration. Additionally, the record shows that Patrick received a conduct report in June 2007, for possession of pornography. Patrick admitted the offense. In an October 2007 decision denying discretionary parole, the Commission stated that the possession of pornography “could be perceived as a high risk behavior” given the nature of Patrick’s convictions. Patrick’s claims that he does not pose a danger to the public if released are conclusory and not persuasive. Given Patrick’s acknowledged lack of SOT, a reasonable person, acting reasonably, could conclude that Patrick remained a substantial risk to the public.² *See id.*, ¶13 (“No

² Patrick states repeatedly that he never refused SOT and that his “sarcastic” answer on the questionnaire should not be equated with a refusal to participate in SOT. We concur with the State’s response: “Even granting Patrick the benefit of the doubt, that he was merely being sarcastic in responding to something as serious as an SOT questionnaire, the Commission was well within its discretion to consider the tone and content of his response in denying parole.”

matter the reason for his not participating in treatment, a reasonable person could conclude that as an untreated sex offender, [the incarcerated inmate] poses a substantial risk to the public.”).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

