

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2010

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. 2008AP2862

Cir. Ct. No. 2008CV2233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. TITUS HENDERSON,

PETITIONER-APPELLANT,

V.

**ALFONZO GRAHAM, RICK RAEMISCH, PETER HUIBRESTSE AND
DAVID WHITE,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Titus Henderson appeals *pro se* from a circuit court order affirming the Parole Commission's decision to deny him parole and deferring his next parole opportunity for forty-eight months. We agree with the

circuit court that the commission's decision was supported by the evidence and was in all other respects proper. We affirm.

¶2 Henderson, an inmate at the Wisconsin Secure Program Facility (WSPF), was convicted in 1995 of first-degree reckless homicide in the shooting death of his brother along with three counts of first-degree recklessly endangering safety. At the time he requested parole, Henderson had served approximately fourteen years of his forty-year sentence. The commission denied Henderson parole for multiple reasons. Henderson's institution adjustment was not satisfactory as evidenced by "multiple behavior logs and numerous conduct reports." After almost four years at WSPF, Henderson had not improved his behavior and continued to engage in misconduct. Henderson did not have an adequate parole plan. The commission also considered the nature and seriousness of his offenses, that release would involve an unreasonable risk to the public, and that further incarceration was needed for punishment. Also militating against parole were Henderson's persistent refusal to take responsibility for his actions and his "yeah, whatever" response to a parole commissioner's admonition that he needs to avoid further conduct reports.

¶3 Henderson sought certiorari review of the parole decision in the circuit court. Henderson complained that he did not receive parole planning documents before the parole hearing, and he did not have access to documents. The circuit court noted that Henderson did not offer a parole plan with regard to employment. Henderson's request for parole materials from the prison social worker was not made with sufficient precision so that the worker understood that Henderson was seeking parole materials. With regard to Henderson's argument that he did not receive documents, the court determined that there was no proof in the certiorari record that Henderson asked for documents. The court also

concluded that Henderson was not denied the opportunity to present evidence, and that the commission properly applied the parole criteria to Henderson's case. As the circuit court succinctly put it:

It is clear from a review of the record that the Commission did exercise its discretion in not granting him parole because the horrendous nature of his crimes was taken into consideration, his attitude and actions demonstrated that he was not likely to abide by society's rules as he could not in a confined setting abide by prison rules, his fixation on the "three officers" conspiring against him thus blaming them for his actions and thus avoiding personal responsibility for them, his myopic view that an adequate plan is a place to live and his lack of recognition of what he needs to change summed up in his parting word, "whatever."

¶4 On certiorari review of a decision of the parole commission, we review whether the commission: (1) kept within its jurisdiction; (2) acted according to law; (3) acted arbitrarily, oppressively or unreasonably; and (4) whether the evidence was such that the commission might reasonably make the order or determination in question. *State ex rel. Hansen v. Dane County Cir. Ct.*, 181 Wis. 2d 993, 998-99, 513 N.W.2d 139 (Ct. App. 1994). Parole rests within the commission's discretion. *Coleman v. Percy*, 96 Wis. 2d 578, 587, 292 N.W.2d 615 (1980). The commission's discretion is guided by WIS. ADMIN. CODE § PAC 1.06(7) (Oct. 2000):

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.

¶5 Henderson does not contend on appeal that he satisfied criteria (b) through (e) or that the commission improperly considered these criteria in making its parole decision. Therefore, the commission appropriately denied him parole because he lacked an adequate parole plan, remained dangerous, had not served an adequate amount of time in light of the seriousness of his offenses, and had not adjusted to the institution.

¶6 Henderson devotes a large portion of his appellate briefs to his contention that the conduct reports and behavior logs considered by the commission were false. As discussed above, the conduct reports, true or not, were not the sole basis for denying Henderson parole. Furthermore, Henderson's challenges to the veracity of the behavior logs and conduct reports are outside the scope of this certiorari review of the commission's denial of parole.

¶7 Henderson renews his argument that his failure to receive parole planning documents from the prison was a due process violation.¹ To the extent there was any error in failing to provide Henderson with parole planning documents, which we do not decide, any such error was harmless because Henderson's substantial rights were not affected. *See Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. A party's substantial rights

¹ Henderson acknowledged receiving the Notice of Parole Commission Consideration, which listed the criteria the parole commission considers. This information was his due process right. *See State ex rel. Tyznik v. DHSS*, 71 Wis. 2d 169, 172-73, 238 N.W.2d 66 (1976). In support of his due process right to parole planning documents Henderson cites WIS. STAT. § 304.06(2) (2007-08). That statute merely states that no prisoner "may be paroled until the parole commission is satisfied that the prisoner has adequate plans for suitable employment...." No due process right is created.

are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. *Id.*

¶8 The record of the parole hearing confirms that Henderson was not able to describe his parole plan beyond his intent to live with his mother. Henderson had an opportunity to explain his parole plan to the commissioner, he did not do so, and the commission had myriad other reasons for denying him parole. If error occurred, it was harmless.

¶9 Henderson incorrectly suggests that the commission denied him parole because he did not have a parole plan. As is apparent from the transcript of the parole hearing and the commission's decision, the commission was primarily concerned with Henderson's conduct in prison, the seriousness of his crimes and the fact that he posed a risk to the public, all appropriate factors to consider.

¶10 Henderson argues that the commission did not follow the appropriate procedures in addressing his parole request. Specifically, he argues that he was denied access to records considered by the commission. WISCONSIN ADMIN. CODE § PAC 1.06(3)(d) states that, with the exception of certain confidential information, an inmate shall have access to documentary information considered by the commission in accordance with procedures governing inmate access to records at the inmate's correctional institution. Henderson did not ask for documents at his parole hearing even after the commissioner informed Henderson of the information upon which he was relying.

¶11 Henderson argues that he was not permitted to appeal his parole denial to the commission's chairperson. The governing rules do not provide for an appeal to the chairperson of the commission. WIS. STAT. § 304.01 (2007-08) (no administrative appeal); WIS. ADMIN. CODE § PAC 1.07(7) (Oct. 2000) (inmate has

an opportunity to comment on parole decision). Review of the parole decision is to the circuit court on certiorari. WIS. STAT. § 302.11(1g)(d) (2007-08).

¶12 Henderson posits an ex post facto argument and claims that he was entitled to parole because he reached his statutory parole eligibility date. As is clear from WIS. ADMIN. CODE § PAC 1.06(7)(a) – (e), reaching the parole eligibility date is not the only criterion for release on parole. WIS. ADMIN. CODE § PAC 1.06(7).

¶13 The commission's parole decision was not arbitrary, was based upon the law and is supported in the record. See *State ex rel. Hansen*, 181 Wis. 2d at 998-99. The commission properly exercised its discretion in denying Henderson parole. See *Coleman*, 96 Wis. 2d at 587.²

By the Court.—Order affirmed.

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

² To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

