COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1064 **Cir. Ct. No. 2015CV6524**

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

ANTHONY DOTY #246639,

PETITIONER-APPELLANT,

V.

WISCONSIN PAROLE COMMISSION,

RESPONDENT-RESPONDENT.

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

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Anthony Doty, *pro se*, appeals a circuit court order that upheld, on *certiorari* review, a Parole Commission decision denying him

release on parole and deferring further parole consideration for twenty-four months. We affirm.

BACKGROUND

¶2 Doty is serving a life sentence for the first-degree intentional homicide that he committed in April 1992. We briefly summarize the facts underlying the conviction and review aspects of his institutional history as a necessary prelude to our discussion of the issues he raises on appeal.

¶3 In early 1992, S.R. ended her romantic involvement with Doty and obtained a restraining order against him, but he continued to contact her, telling her in one telephone call that "[i]f I can't live with you, nobody can." On April 6, 1992, S.R.'s friend James Davis called the fire department to report that someone had set a mattress on fire outside of S.R.'s home, and Davis expressed his suspicion that Doty was the culprit. Later that evening, Davis and Doty met at a local tavern where, according to Doty, they discussed "the living situation." After traveling to a remote location where they drank and talked about S.R., Doty shot Davis twice in the head. Leaving Davis to his fate, Doty went home, where he reloaded and hid his gun. Davis died from his wounds.

¶4 The State charged Doty with first-degree intentional homicide while armed, and Doty pled guilty to the charge. The matter proceeded to sentencing in August 1992. At that hearing, the circuit court "committed [Doty] to the Wisconsin state prisons for the rest of [his] life" and declared him ineligible for parole before August 2012.

¶5 When Doty entered prison, a social worker prepared a report stating that he "minimized his involvement in the current offense, placing the blame on

the victim." A staff psychologist subsequently evaluated Doty and noted he was "quite defensive and attempted to spend [a] significant amount of time making excuses about his crime and blaming his ex-girlfriend." The psychologist went on to opine that Doty "may have a significant amount of rage when he feels abandoned or out of control. It is probably difficult for him to either control or accept this rage, so he would have a hard time dealing with it in an adaptive manner." The report concluded by establishing a "therapeutic goal [for Doty] ... to accept responsibility for his offense and stop[] blaming ... others for it."

¶6 In 2012, the Parole Commission considered Doty for parole. Doty did not prevail; the Commission denied parole and deferred further consideration for three years.

¶7 After the 2012 denial of parole, Doty participated in a Department of Corrections classification review. In that proceeding, he took the position that "his ex-girlfriend sent the victim to kill [Doty] to obtain his life insurance money as she was the beneficiary. He stated he got scared and shot the victim. He stated ... [Davis] was 'victimized twice,' once by the female and again when he lost his life."

¶8 In 2015, the Parole Commission considered Doty for parole a second time, and the adverse outcome of that proceeding underlies the instant appeal. A commissioner interviewed Doty and made a written recommendation to deny parole, giving as general reasons both that "release at this time would involve an unreasonable risk to the public" and that Doty "ha[d] not served sufficient time for punishment." More specifically, the commissioner wrote:

> [t]he record noted that you reported that you thought the victim was going for a weapon and that you feared for your life. It was at this point that you pulled a gun

> and from over the top of [the] car shot the victim twice in the head.... You admit to the shooting and express remorse for the behavior, but when questioned about your motivation and how your relationship with your ex-girlfriend may have influenced your behavior, you seemed to be more evasive and denied any significant issues with that relationship. Your characterization of the shooting is also of concern in that you claim that you were scared and thought the victim had a weapon. This is simply unbelievable based on everything that's in the record.... Based on the nature and severity of the case, the senseless taking of a life[,] it's clear that you continue to present as an unreasonable risk and that more time is warranted so as not to depreciate the severity of your offending behaviors and therefore the decision by the Commission will be to defer your case for 24 months.

The Commission chair approved the recommendation.

¶9 Doty petitioned for *certiorari* review. After the Parole Commission transmitted the certified record to the circuit court, Doty moved to supplement that record with his sentencing transcript and his institutional disciplinary history. In response to Doty's motion, an assistant attorney general advised the circuit court by letter that the Commission would supply information regarding Doty's institutional conduct reports but that "no sentencing transcripts are available." Nonetheless, as the circuit court docket reflects and as the record before this court confirms, approximately a week later the Commission filed a supplemental return that included not only information about Doty's disciplinary history but also his sentencing transcript. The Commission certified that the "documents are a true and correct copy of the signed notice used in the parole proceeding of Inmate Anthony Doty."

¶10 Following briefing, the circuit court affirmed the Parole Commission's decision denying parole. Doty appeals.

DISCUSSION

¶11 Parole decisions are subject to *certiorari* review. *See* ***State ex rel. Hansen v. Circuit Court***, 181 Wis. 2d 993, 998-99, 513 N.W.2d 139 (Ct. App. 1994). On appeal from a circuit court order affirming or denying a decision of the Parole Commission, we review the Commission's decision, not the decision of the circuit court. *See* ***Richards v. Graham***, 2011 WI App 100, ¶5, 336 Wis. 2d 175, 801 N.W.2d 821. The scope of our review is limited to determining whether: "(1) the agency kept within its jurisdiction; (2) it acted according to the law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question." ***Id.***

¶12 Doty first argues that the Parole Commission failed to "keep within its jurisdiction as it arrogated to itself the authority to determine sufficient time for punishment." He believes that the Commission usurps the judicial function by considering whether a parole-eligible inmate served sufficient time in prison for punishment purposes. Doty is wrong. We have previously concluded that the Commission may consider such a factor. *See* ***id.***, ¶20. We must adhere to that conclusion. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Moreover, the Commission is required to consider whether an inmate has served sufficient time "so that release would not depreciate the seriousness of the

offense." *See* WIS. ADMIN. CODE § PAC 1.06(16)(b) (Dec. 2011).[1] The question of whether the inmate has served sufficient time for punishment is plainly a component of that necessary assessment.

¶13 Doty also contends that when the circuit court established his parole eligibility date, the circuit court "deemed 20 years to be appropriate in ... Doty's case, depending on his institution conduct and treatment." (Some punctuation omitted.) He thus appears to argue that the Parole Commission exceeded its jurisdiction because, in his view, the Commission required him to spend more time in prison than the sentencing judge ordered. Doty confuses the sentencing court's decision establishing a parole eligibility date with a decision establishing the length of his confinement. The circuit court imposed life in prison in this case. Although the circuit court established a date on which Doty could be considered for parole, the date on which release is appropriate rests in the discretion of the Commission, not the sentencing court. *See* WIS. STAT. §§ 973.013(1)(b) (2015-16),[2] 304.01(1); *see also* ***Coleman v. Percy***, 96 Wis. 2d 578, 587-88, 292 N.W.2d 615 (1980).

¶14 Doty next claims the Parole Commission failed to act according to law because, he alleges, the Commission did not review the entire record. A presumption of correctness and validity is attached to administrative agency actions and orders. *See* ***Pire v. Wisconsin State Aeronautics Comm'n.***,

[1] All references to the Wisconsin Administrative Code are to the version in effect at the time of the 2015 Parole Commission determination. The version of Chapter PAC 1 in effect in 2015, which is also the version in effect today, was adopted in December 2011. *See* 672B Wis. Adm. Reg. (Dec. 31, 2011).

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

25 Wis. 2d 265, 273, 130 N.W.2d 812 (1964); *see also* 2 AM. JUR. 2D *Administrative Law* § 458 (2014). "On *certiorari* review, the petitioner bears the burden to overcome the presumption of correctness." ***Ottman v. Town of Primrose***, 2011 WI 18, ¶50, 332 Wis. 2d 3, 796 N.W.2d 411 (italics added).

¶15 To support his claim that the Parole Commission failed to act according to law, Doty argues first that the Commission did not give express consideration to every document that he views as pertinent to the criteria for granting parole. We are not persuaded.

¶16 The Parole Commission is not required to consider every document that an inmate might view as having some conceivable bearing on the criteria for parole. Rather, WIS. ADMIN. CODE § PAC 1.06(8) provides that the Commission's decision shall be based on "information available, including file material, victim's statements if applicable, and any other relevant information." The transcript of the parole hearing in this case shows that the commissioner who conducted the hearing expressly stated at the outset that he would first "be reviewing the [i]nmate's file." Moreover, the commissioner's ultimate recommendation against parole reflects the commissioner's familiarity with relevant information. Specifically, the commissioner discussed the crime that Doty committed, his institutional adjustment, and his plans in the event of his release. In sum, the record reflects that the Commission made its decision in compliance with § PAC 1.06(8).

¶17 Nonetheless, Doty argues "it is well proven that [the] commissioner ... failed to review" his sentencing transcript and disciplinary history. In support, he reminds us that those documents were not included in the original record transmitted from the Parole Commission to the circuit court pursuant to Doty's

petition for a writ of *certiorari*. He also points to: (1) a document he submitted to the circuit court purporting to show that a prison records custodian told Doty that the portion of his prison file containing the sentencing transcript was not provided to the Commission; and (2) the assistant attorney general's letter, offered in response to Doty's motion to supplement the record, advising the circuit court that the sentencing transcript was unavailable. Neither the partial original record transmittal nor the documents outside the administrative record on which Doty relies is sufficient to demonstrate any irregularity in the parole hearing.

¶18 The record shows that the commissioner who conducted the parole hearing expressly confirmed during the course of the hearing that he had reviewed the sentencing transcript. We have no basis to reject that assertion. To the contrary, it is supported by the supplemental record transmittal, which included the sentencing transcript and a certification that the documents transmitted were those used in the parole proceeding. As to Doty's institutional disciplinary history, Doty and the commissioner both discussed that history during the parole hearing, and the recommendation to deny parole described components of the discipline he received. Moreover, the supplemental record included a summary of Doty's disciplinary history. In light of the foregoing, Doty fails to overcome the presumption of correctness that attaches to the Commission's actions.

¶19 We turn to Doty's contention that the evidence was not sufficient to sustain the Parole Commission's decision to deny parole. The test on *certiorari* review is the substantial evidence test. *See* ***Richards***, 336 Wis. 2d 175, ¶6. Under that test, '"we determine whether reasonable minds could arrive at the same conclusion'" as that reached by the Commission. *See* ***id.*** (citation omitted). This test has long been characterized as involving a "'low burden of proof.'" *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620

N.W.2d 414 (citing ***State ex rel. Eckmann v DHSS***, 114 Wis. 2d 35, 43, 337 N.W.2d 840 (Ct. App. 1983)). To apply the substantial evidence test:

> 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."

State ex rel. Gendrich v. Litscher, 2001 WI App 163, ¶12, 246 Wis. 2d 814, 632 N.W.2d 878 (internal citations and quoted source omitted).

¶20 Doty preliminarily appears to claim that the foregoing test applies only to parole revocation decisions, not to parole application decisions. That claim is incorrect. The test we use when considering the sufficiency of the evidence is dictated by the nature of our review—*certiorari*—not the subject matter of the agency decision underlying that review.[3] *See* ***Richards***, 336 Wis. 2d 175, ¶6. Accordingly, we turn to the substantive question of whether the evidence was sufficient under the applicable substantial evidence test to sustain the Commission's decision denying parole and deferring further review for twenty-four months.

¶21 WISCONSIN ADMIN. CODE § PAC 1.06(16) lists a variety of parole criteria, including whether "the inmate has served sufficient time so that release

[3] For the sake of completeness, we point out that both ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, 246 Wis. 2d 814, 632 N.W.2d 878, and ***Richards v. Graham***, 2011 WI App 100, 336 Wis. 2d 175, 801 N.W.2d 821, address parole applications. *See* ***Gendrich***, 246 Wis. 2d 814, ¶1; ***Richards***, 336 Wis. 2d 175, ¶1.

would not depreciate the seriousness of the offense" and whether "the inmate has reached a point at which the [Parole C]ommission concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice." *See* § PAC 1.06(16)(b)&(h). Here, the Commission found that application of those criteria required denying Doty's parole application. We conclude that sufficient evidence supports the Commission's findings.

¶22 The Parole Commission could reasonably infer that the explanation Doty offered for his crime—that he killed Davis during a social encounter fearing Davis was reaching for a weapon—was a self-serving effort to minimize the gravity of the intentional homicide that Doty committed. The Commission could also reasonably infer that Doty's explanation reflected his failure to accept full responsibility for his actions and demonstrated a need for additional time in prison so as not to depreciate the severity of his crime.

¶23 On appeal, Doty insists that the Parole Commission should have believed his version of events, but the Commission, not this court, weighs and assesses the evidence, *see* ***Washington***, 239 Wis. 2d 443, ¶26, and, "as with any other fact finder, we properly defer to the [Commission]'s credibility findings," *see* ***id.*** Indeed, even Doty appeared to recognize during the hearing that the explanation he was offering for his actions strained credulity. When the commissioner expressed concern about Doty's claimed rationale for the homicide, Doty responded, "[i]t's beyond belief I know.... I can't explain it."

¶24 Further, the Parole Commission could reasonably conclude from the record that Doty posed an unreasonable risk to the public if released. The Commission noted that although Doty admitted his crime and offered statements of remorse at the outset of the hearing, he became evasive and defensive as the

hearing progressed. As the circuit court observed: "the [C]ommission's risk assessment turned on concerns that Doty is deceiving himself about why he committed the crime and whether blinding himself to his capacity for killing and his resentment of [S.R.] might leave him at risk of attacking someone else in the future." The circuit court then elaborated on the basis for the Commission's concerns and why those concerns were reasonable:

> [t]here is evidence in the record to sustain the [C]ommission's judgment that Mr. Doty was angry about his break-up with [S.R.] and that his anger may have fueled his decision to kill Mr. Davis. Mr. Doty himself supplies the evidence: the ... report of the police interview [with S.R. soon after the homicide] ... demonstrates not only that "after the restraining order/injunction [against him] was issued, she received numerous harassing telephone calls," but also that Mr. Doty told her, "[i]f I can't live with you nobody can." Further, it seems that Mr. Doty believes not only that Mr. Davis was [S.R.'s] friend ... but that Mr. Davis actually was living with her. Finally Mr. Doty did not deny [the] Commissioner['s] ... suspicion that the reason Mr. Davis and Mr. Doty got together that evening was to discuss these relationship issues.
>
> In addition to this evidence, the [C]ommission had before it the evidence ... showing that Mr. Doty tends to minimize his own responsibility for the murder and that instead he tends to blame Mr. Davis and [S.R.].

¶25 Doty does not agree that the Parole Commission acted reasonably. He claims it should have drawn different inferences and relied on information that he views as favorable to his position. Our standard of review, however, requires us to look for evidence in the record that supports the Commission's decision and to sustain that decision if the record contains such evidence. *See* ***Gendrich***, 246 Wis. 2d 814, ¶12. The evidence in the record here easily clears the low threshold

necessary to satisfy the substantial evidence test. Because the evidence supports the Commission's conclusions that Doty presented an unreasonable risk and should spend more time in prison so as not to depreciate the severity of his offense, his challenge to the sufficiency of the evidence must fail.

¶26 Doty next argues that the Parole Commission's actions were arbitrary and capricious. We reject this contention. "A determination that has a rational basis is neither arbitrary nor capricious." ***Cohn v. Town of Randall***, 2001 WI App 176, ¶26, 247 Wis. 2d 118, 633 N.W.2d 674. As we have seen, the record in this case includes substantial evidence supporting the Commission's decision. Because the Commission had a rational basis for denying Doty parole, the decision was not arbitrary or capricious. *Cf.* ***Westring v. James***, 71 Wis. 2d 462, 475-76, 238 N.W.2d 695 (1976) (explaining that an administrative agency's decision supported by substantial evidence will virtually never be held arbitrary or capricious); *see also* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 66, 267 N.W.2d 17 (1978) (stating that parole revocation is not arbitrary and capricious when the agency presented sufficient grounds for revocation).

¶27 Before we conclude, we briefly address two additional matters. First, Doty asks us to order the Parole Commission to conduct a polygraph examination to test his version of the events surrounding his crime. Such an order is outside the scope of our limited review on *certiorari*. *See* ***Richards***, 336 Wis. 2d 175, ¶5. Second, Doty asks in his reply brief that we declare this matter governed by the version of the Wisconsin Administrative Code in effect in

January 1993.[4] Doty did not present this request to the circuit court. Accordingly, we will not consider it.[5] *See* ***State v. Dowdy,*** 2012 WI 12, ¶4, 338 Wis. 2d 565, 808 N.W.2d 691.

By the Court.—Order affirmed.

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

[4] Normally, we consider challenges to the denial of parole under the version of the Wisconsin Administrative Code in effect at the time of the Parole Commission's determination. *See* ***Richards***, 336 Wis. 2d 175, ¶13 n.4. We have followed our normal practice here.

[5] Doty's appellate briefs are lengthy and at times repetitious. To the extent that we have not addressed a specific contention in Doty's submissions, we have determined it does not warrant an individualized response and the argument is rejected. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").