

FILED
05-13-2024
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2024AP000304

STATE OF WISCONSIN ex rel.
JORGE VELA,
Petitioner-Appellant

v.

DOUGLAS DRANKIEWICZ,
JON ERPENBACH, AND
WISCONSIN PAROLE COMMISSION,
Respondents-Respondents.

ON REVIEW OF A DENIAL OF A PETITION
FOR CERTIORARI, ENTERED IN THE
RACINE COUNTY CIRCUIT COURT ON
FEBRUARY 1, 2024, THE HONORABLE
DAVID PAULSON, PRESIDING.

**BRIEF AND APPENDIX OF
PETITIONER-APPELLANT**

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ISSUE PRESENTED

Did the Parole Commission insert its will and not its judgment into its consideration of parole for Mr. Vela, therefore making its decision arbitrary and capricious?

The circuit court ruled that the Parole Commission's decision was based on a proper assessment of the facts and was reasonable; thus, the

Parole Commission did not insert its will, rather than its judgment, into the decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Vela does not seek oral argument or publication, as these issues are the subject of settled law.

STATEMENT OF FACTS

Jorge Vela was convicted of first-degree intentional homicide by use of a dangerous weapon on November 6, 1991, and sentenced on December 20, 1991. 27:26. He received a life sentence with the possibility of parole after serving 25 years (December 20, 2016). 27:26. He has been incarcerated since December 1990, nearly 34 years ago. *Id.* Mr. Vela was 30 years old when he was arrested and incarcerated; he is now 63 years old and has spent more than half his life in prison.

At Mr. Vela's first meeting with the Parole Commission in 2016, Commissioner Douglas Drankiewicz deferred Mr. Vela's case for 36 months, noting that the violent nature of the crime indicated that Mr. Vela was still a danger to the public and more time in prison was warranted so as not to depreciate the seriousness of the offense. 29:8. At each of Mr. Vela's meetings with the Parole Commission since then, the reasons given for deferral have been the same. *Compare* 27:69 and 28:1–21.

In October 2022, the Parole Commission denied Mr. Vela parole for a sixth time and issued a 12-month deferral, an increase from the six-month deferral he

received in April 2022. 28:1. Undersigned counsel submitted parole advocacy materials to the Parole Commission asking Parole Commission Chairperson Jon Erpenbach to review the decision. 8:1. In February 2023, Mr. Vela received a letter from Chairperson Erpenbach (dated January 26, 2023) affirming the decision of the Parole Commission to defer his case for 12 months. 32:13.

On March 9, 2023, Mr. Vela filed a Petition for Writ of Certiorari challenging the October 2022 Parole Commission decision denying him parole release and the January 2023 decision by the Parole Chairperson approving that deferral. 5. On March 13, 2023, the Honorable David W. Paulson ordered the return of the record. 13. A briefing schedule was set on August 9, 2023, and amended on October 9, 2023, after the sealed record was made available to Mr. Vela on September 12, 2023. 44:1; 47:1. On January 17, 2024, the circuit court found that the Parole Commission's decision to defer Mr. Vela's parole for another 12 months was reasonable and not willful, arbitrary, or capricious. 51:4–6. The circuit court entered its final order denying the petition for writ of certiorari on February 1, 2024. 54:1.

STANDARD OF REVIEW

Appellate review of a Parole Commission decision is the same as the circuit court's review on a petition for writ of certiorari. *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶ 4, 246 Wis. 2d 814, 632 N.W.2d 878. Therefore, this Court does not review the circuit court's decision. *Richards v. Graham*, 2011 WI App 100, ¶ 5, 336 Wis. 2d 175, 801 N.W.2d 821. Instead, like the circuit court, this Court must

determine “whether (1) the Commission kept within in its jurisdiction; (2) it acted according to 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.” *Richards*, 2011 WI App 100, ¶ 5 (citing *State ex rel. Purifoy v. Malone*, 2002 WI App 151, ¶ 13, 256 Wis. 2d 98, 648 N.W.2d 1.).

The Wisconsin Parole Commission is vested with the authority to exercise its discretion to release an inmate on discretionary parole. *Gendrich*, 2001 WI App 163, ¶ 9. The Parole Commission must consider the following factors in determining whether a person who is eligible for parole should be released: whether the person (1) has developed an adequate reentry plan; (2) has served sufficient time in prison so that release would not depreciate the seriousness of the offense; (3) has completed required programming while in prison; (4) has maintained satisfactory conduct in prison; and (5) would not pose an “unreasonable” risk to the public if released. Wis. Admin. Code § 1.06(16).

The Parole Commission’s discretion is not unlimited. While this Court may not substitute its own judgment for that of the Parole Commission, the Commission’s decision must stand up to the substantial evidence test. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). “[A]n agency does not act in an arbitrary or capricious manner if it acts on a rational basis.... Arbitrary action is the result of an unconsidered, wilful (sic) or irrational choice, and not the result of the ‘sifting and winnowing’ process.” *Van Ermen v. State, Dep’t of Health & Soc. Servs.*, 84 Wis. 2d 57, 65, 267 N.W.2d 17

(1978). Therefore, the administrative agency's decision must be based on less than a preponderance of evidence but more than a mere scintilla of evidence, and more than conjecture and speculation. *State ex rel. Nudo Holdings, LLC v. Bd. of Review*, 2020 WI App 78, ¶ 25, 395 Wis. 2d 261, 281, 952 N.W.2d 816, 826.¹

ARGUMENT

The Parole Commission exercised its will, not its judgment, when it increased Mr. Vela's parole deferral from six months to 12 months.

The Parole Commission relied on the factors laid out in Wis. Admin. Code PAC § 1.06(16) to determine Mr. Vela's eligibility for parole release. The Commission noted that Mr. Vela has satisfied three of the five main criteria it considered: he has established an adequate reentry plan, demonstrated satisfactory program performance, and shown excellent institutional conduct. However, the Commission also determined that Mr. Vela has not yet served sufficient time in prison for punishment and that his release would pose an unreasonable risk to the public.

This decision is not reasonable. Mr. Vela has maintained excellent conduct while in prison, including completing treatment and changing the behavior patterns that led to the commission of the

¹ Mr. Vela met with the Parole Commission for the seventh time in October 2023. The October 2023 decision is not before this Court. An inmate's request for review of a decision of the Parole Commission is not moot because he has received another parole review. *Richards*, 2011 WI App 100, ¶ 11. Further, appellate courts can decide an issue, even if it is moot, "if the issue is likely to reoccur but continue to evade appellate review because of the substantial time required for the appellate review process." *Id.*

crime. The Commission improperly inserted its will into deciding whether to parole Mr. Vela because it did not engage in the winnowing and sifting process, improperly considered whether Mr. Vela would illegally return to the United States, and assigned improper weight to the former Chairperson's rejection of recommended deferral periods. Moreover, the Commission engaged in speculation that Mr. Vela might return to the United States after being paroled and deported.

A. Mr. Vela has demonstrated excellent conduct while incarcerated, indicating that he is not a danger to the public and has served sufficient time.

The Parole Commission's contention that Mr. Vela still poses a risk to the public is misplaced and merely speculative. At every subsequent hearing after Mr. Vela's initial appearance before the Parole Commission in 2016, the reasons for deferral were always the same with edits only to reflect additional programming and/or potential transitions through institution security levels. *Compare 27:69–70 with 28:1–2, 4–5, 16–17, 27–28, 30–31, 39–40.*

Mr. Vela completed all institutional programming requested of him years ago and has not had a major conduct report in nearly 16 years. 27:69. He held a job as a tram driver at Oshkosh Correctional Institution for seven years, when the average time to hold a job in prison is two years. 27:11. Driving a tram requires entrusting the person in prison with the responsibility of transporting prison staff and requires the driver to have extensive contact with the staff. 11:1. Job reviews show that Mr. Vela has been

positive, professional, and timely, earning him the privilege of maintaining this important job for seven years. 11:1; 27:11.

Mr. Vela's COMPAS scores in his April 2022 Inmate Classification Report show his low likelihood of both violent recidivism and general recidivism. 14:4. The COMPAS scores also indicate that his recommended supervision level is low. 14:4. The Parole Commissioner supported a transition to a minimum-security facility, but a detainer placed on Mr. Vela in 1992 makes that transition impossible. 14:3. He will be released to the custody of Immigration and Customs Enforcement (ICE) when he is paroled, and will likely be deported to Mexico. Despite this restriction, Mr. Vela has created an acceptable release plan in anticipation of parole. 28:10–11.

Further, the Parole Commission's contention that granting Mr. Vela parole at this time would depreciate the seriousness of the offense is arbitrary and capricious. The court sentenced Mr. Vela to life in prison with the possibility of parole after 25 years. 36:44. This is nearly twice as much time as Mr. Vela would have served before becoming eligible for parole if the court had left Mr. Vela's sentence to be determined by statute, which indicated a minimum sentence of 13 years and four months. 36:18. Mr. Vela, now 63 years old, has spent more than half his life incarcerated and has turned his life around from the person he was more than three decades ago.²

² It is not Mr. Vela's intent to replace the Parole Commission's reasoning with his own reasoning or the sentencing court's reasoning. Instead, he wishes to bring to the Court's attention the discrepancy in the time the sentencing court expected Mr. Vela to serve, and thought was fair, based on Mr. Vela's crime. The sentencing court made Mr. Vela eligible for parole after he

The Parole Commission is required to advise an inmate, in writing, of its parole deferral decision, the reasons for that decision, and the date of the inmate's next parole consideration. Wis. Admin. Code PAC § 1.07(2). *Pro forma* language that an inmate's release would depreciate the seriousness of his offense is not a sufficient reason for denial of parole. *Candarini v. Attorney Gen. of United States*, 369 F. Supp. 1132, 1137 (E.D.N.Y. 1974) ("What is required is that the Board set forth sufficient facts and reasons to enable a reviewing court to ascertain whether an abuse of discretion has been committed and to enable the inmate to know why he has been denied parole and what he can do to better regulate his future conduct."). In Mr. Vela's case, the Parole Commission provided only this reasoning: "Based on the nature and severity of the case ... it is 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...." 27:70.

The meaning of "depreciate the seriousness of the offense" is unclear without additional reasoning. *Soloway v. Weger*, 389 F. Supp. 409, 411 (M.D. Pa. 1974). The *Soloway* court was concerned about the arbitrariness of blindly keeping a person incarcerated because of a set of minimum sentence guidelines without considering a person's involvement in the crime. *Id.* However, arbitrariness *without* set guidelines can also be true. "[T]he lack of a standard for setting a parole reconsideration date indicates that

had served 25 years. 36:44. After 25 years, the Parole Commission has the discretion to make a non-arbitrary, reasonable decision about Mr. Vela's parole under Wis. Stat. Ch. 304. Mr. Vela has now been incarcerated for nearly 34 years.

the reasons for the Commission's decision on deferring parole also serve as the reasons for the length of the deferment." *Richards*, 2011 WI App 100, ¶19.

The Parole Commission's reasons for denying Mr. Vela parole have never changed. Because the Commission has no formal guidelines for determining the length of a parole deferral, there is no certainty as to when Mr. Vela will have served sufficient time so as not to depreciate the seriousness of the offense. The decision is purely up to the discretion of the Parole Commission. In Mr. Vela's case, "you have not served enough time so as not to depreciate the seriousness of your offense due to the nature of your crime" is arbitrary, *pro forma* reasoning. Such conclusory language provides no means for this Court "to ascertain whether an abuse of discretion has been committed" or for Mr. Vela "to know why he has been denied parole and what he can do to better regulate his future conduct." *Candarini*, 369 F. Supp. at 1137.

DOC programming documents show that Mr. Vela has changed the way he thinks about himself and the crime. He has changed the pattern of thought that led him to commit the crime. 34:20–28, 34–37. Moreover, Mr. Vela immediately expressed remorse for his actions and has continued to express that same remorse while recognizing that he is not entitled to forgiveness:

I know it's really hard for me to ask, I mean, I know I don't got the right to ask for forgiveness for what I did but I wish and pray that [the victim's] family find peace and healing. I know I've caused a lot of pain and suffering and I'm truly sorry.

27:12; 36:30. Mr. Vela has also admitted to displaying violent tendencies while he was under the influence of drugs and alcohol. 37:34–35. Mr. Vela has been sober since 1990, has successfully completed Alcohol and Other Drug Abuse programming, anger management, and domestic violence programming, as requested by DOC. 28:48. Mr. Vela has never displayed violent tendencies while in prison and none of his conduct reports has been for assaultive behavior. 35:5, 6, 12, 21, 24, 26, 27; 36:5, 7, 9.

Although Mr. Vela cannot move on from his crime entirely, he has decided to focus on the future: “As much as I wish I could go back, I can’t; so I chose to focus on what I can control, my future actions.” 28:43. Mr. Vela has changed his thinking, participated in more programs than he was required to, and made a sincere effort to change the way he acted even before getting the treatment he needed:

All programs helped me a lot to learn about myself, but the impact I caused to the family of my victim, and my own family, motivated me to change my life around, to accept responsibility for my actions, and to see how much I can hurt others by my actions.

25:32. In 2020, a social worker said of Mr. Vela:

[I]t is my professional opinion that Mr. Vela exemplifies the Department of Corrections Re-entry Vision Statement. Not only has he accepted personal responsibility for his actions, but has proven committed to his rehabilitation and future success. The skills he has gained while incarcerated will serve as an asset to him and his community.

28:38.

If Mr. Vela had refused prison programming, resisted treatment and rehabilitation, or denied responsibility for the crime, then perhaps the Commission's contention that Mr. Vela should remain incarcerated so as not to depreciate the seriousness of his offense would be reasonable. *See, e.g., Von Arx*, 185 Wis. 2d at 661 (upholding revocation of probation because the inmate refused to participate in treatment to reduce the risk he posed to society); *State ex rel. Saenz v. Husz*, 198 Wis. 2d 72, 76, 542 N.W.2d 462, 464 (Ct. App. 1995) (upholding denial of parole because, although the inmate had obtained his GED while in prison, he refused to participate in programming and continued to receive major conduct reports). But Mr. Vela has willingly participated in and applied himself to prison programming, so much so that he has nearly run out of options. He has rehabilitated himself through his remarkable, lengthy, and ongoing efforts. The Parole Commission's arbitrary focus on the nature of the crime does not reflect its discretion but its will, and a lack of meaningful engagement in the sifting and winnowing process. Mr. Vela clearly appreciates the seriousness of his offense and poses no danger to the public.

B. The Parole Commission improperly inserted its will into its consideration of Mr. Vela's parole decision.

After generally noting Mr. Vela's good conduct while incarcerated, the Parole Commission chose only to focus on the nature of the crime to decide that Mr. Vela would pose a risk to the public upon his release and has not served enough time so as not to depreciate the seriousness of his offense. 27:70. The nature of the

crime, when viewed alongside the additional factors of Mr. Vela's case, is not sufficient to warrant spending more time than he already has in prison. By keeping Mr. Vela incarcerated, the Parole Commission is imposing its will rather than its judgment. Furthermore, by focusing only on the nature of the crime, the Parole Commission fails to engage meaningfully in the winnowing and sifting process. *Van Ermen*, 84 Wis. 2d at 65.

Commissioner Drankiewicz made comments during Mr. Vela's hearings about the length of Mr. Vela's parole deferrals. During the April 2022 parole hearing, Commissioner Drankiewicz stated, "One more thing to note and I will just start, share this. This is your fifth meeting with the Parole Commission and the last two meetings have been adjusted or amended by the Chairman ... in a downward or shorter ... deferment." 27:7. Commissioner Drankiewicz then reviewed the history of deferrals he had recommended for Mr. Vela, noting that his 18-month deferral recommendation in October 2020 was reduced to 12 months by former Chairperson John Tate, and his 12-month deferral recommendation in October 2021 was reduced to a 6-month deferral by Chairperson Tate. 27:7.

During Mr. Vela's parole review hearing in October 2022, Commissioner Drankiewicz stated:

I've tried to reflect what I thought as responsible deferrals over the years and it was in the last two deferrals that the Chairman ... intervened and reduced the deferral and so it's hard for me ... to consider the case and not consider what was done to those deferrals.

27:17–18. A Chairperson’s modification of a Commissioner’s recommendation is not an appropriate consideration for parole under Wis. Admin. Code PAC § 1.06(16), in contrast to an official policy preference, which can be an appropriate consideration. *Richards*, 2011 WI App 100, ¶20. Commissioner Drankiewicz’s comments indicate insertion of the Commission’s will to keep Mr. Vela incarcerated, rather than a reasonable judgment about whether Mr. Vela should be paroled. Current Chairperson Jon Erpenbach has done so as well through affirmation of the increased deferral.

Commissioner Drankiewicz also speculated about whether Mr. Vela would return to the United States illegally if he were deported or allowed to reside in Mexico as part of his parole plan:

[L]ooking at the way that ... immigration is and ... how easy it is to come back into the country which would obviously be illegal ... but is nonetheless ... it’s just something in the back of my mind when I think about it.

27:10. One of the criteria the Parole Commission may consider related to discretionary parole is whether “[t]he inmate ... is in the United States illegally and may be deported.” Wis. Admin. Code PAC § 1.06(16)(g). Detainers are mentioned twice on the “Notice of Parole Consideration” forms; once under “Parole Release Plan” (“The existence of any detainers on file”) and once under “Risk to the Public” (“Detainers”). 27:73–74.

This language implies the Parole Commission should consider Mr. Vela's detainer only to determine whether his release plan is adequate and whether he presents a risk to the community. The Parole Commission found Mr. Vela's release plan to be adequate, but also found that he presents a risk to the community. 27:69. Detainers actually weigh *in favor* of parole, as those who are deported do not present a danger to the community. *See, e.g., United States v. Hussain*, No. 13-CR-661-PWG, 2021 U.S. Dist. LEXIS 145055, 2021 WL 3367822, at *14 (D. Md. Aug. 3, 2021) (finding that an inmate subject to an immigration detainer would be paroled to the custody of ICE and/or deported after being paroled and thus did not pose a danger to the community); *United States v. Afanasyev*, No. 17 Cr. 350, 2020 U.S. Dist. LEXIS 204049, 2020 WL 6395303, at *5-*6 (S.D.N.Y. Oct. 30, 2020) (same); *United States v. Bravo-Ziranda*, No. 3:18-cr-00415-K-1, 2023 U.S. Dist. LEXIS 119526 at *16 (N.D. Tex. July 10, 2023) (same, citing *Hussain* and *Afanasyev*).

Proper use of the sifting and winnowing process would find that Mr. Vela does not pose a risk to the community. Mr. Vela has explicitly stated that he has no intention of returning to the United States if and when he is deported. In a letter to former Chairperson Blythe, Mr. Vela wrote:

[Commissioner Drankiewicz] mentioned that he was "very concern[ed]" about me coming back to the States, if I was to be deported to Mexico. Most violent offenders are release[d] in Wisconsin, so I don't understand why he's even concern[ed]. Besides, after doing all of this time in prison, I'm not going to risk getting locked up again for the rest of my life.

32:15.

It is not appropriate for Commissioner Drankiewicz to base his decision to deny Mr. Vela parole based on mere *speculation* that Mr. Vela intends to return illegally to the United States after being deported, rather than making a reasoned decision based on the sifting and winnowing process.

CONCLUSION

The decision to grant parole remains in the hands of the Parole Commission—as long as that decision is reasonable and based on facts found in the record. Conjecture and speculation cannot take the place of a logical, fact-based decision. Commissioner Drankiewicz imposed his will when he denied Mr. Vela parole and increased the deferral. Moreover, the effect of Mr. Vela’s crime on the victim’s family and the nature of the offense will never change. Continuing to rely on those factors after nearly 34 years creates an unbreakable loop that indefinitely keeps Mr. Vela in prison.

Respectfully submitted this 13th day of May 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(b), (bm), and (c) for a brief. The length of this brief is 3,505 words.

Electronically signed by

Gregory W. Wiercioch

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with § 809.19 (2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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