

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KENNETH L .LANE, :
Petitioner, : C.A. No. K10A-06-010 WLW
v. :
BOARD OF PAROLE, :
Respondent. :

THEODORE M. NEWHOUSE, JR., :
Petitioner, : C.A. No. K10A-07-001 WLW
v. :
BOARD OF PAROLE, :
Respondent. :

Submitted: May 15, 2012
Decided: August 30, 2012

ORDER

Upon Petitioners' Writ of Certiorari for
Review of Decision of Board of Parole.
Reversed and Remanded.

Andre M. Beauregard, Esquire of Brown Shiels & O'Brien, LLC, Dover, Delaware;
attorney for the Petitioners.

Elio Battista, Jr., Esquire, Paul R. Wallace, Esquire and James T. Wakley, Esquire,
Department of Justice, Wilmington, Delaware; attorneys for the Respondent.

WITHAM, R.J.

The issue before the Court is whether the Board of Parole committed legal error, exceeded its jurisdiction, or proceeded irregularly. It is noted that these cases have been consolidated for purposes of this Order upon agreement of the parties.

FACTS

Kenneth Lane (“Lane”) and Theodore M. Newhouse, Jr. (“Newhouse”) (jointly “Petitioners”) bring writs of *certiorari* appealing their respective decisions by the Board of Parole (“Board”). Petitioners appealed to the Board after their designation as Tier II sex offenders by the Attorney General. The Board determined that the lesser Tier I designation was appropriate for Petitioners. On September 14, 2011, the Court set a briefing schedule in both cases. On October 6, 2011, Petitioners advised the Court that they could not fully brief the matter as the Board failed to produce a transcript or recording of the proceedings. Petitioners therefore filed a rule to show cause as to why their designations should not be dismissed with prejudice for lack of a transcript below. The Court heard oral argument on the rule to show cause on November 10, 2011. On February 21, 2012, the Court issued a decision denying Petitioners’ rule to show cause.¹ On February 22, 2012, the Court set identical briefing schedules for Petitioners’ cases. The arguments in the cases were combined for the purposes of briefing. Briefing was completed and finally submitted to the Court on May 15, 2012. This is the Court’s decision on these consolidated matters.

Standard of Review

The basis for the Superior Court’s power to issue writs of *certiorari* is

¹*Lane v. Bd. of Parole*, 2012 WL 1413987 (Del. Super. Feb. 21, 2012).

constitutional.² “Review on a writ of *certiorari* issued by the Superior Court differs fundamentally from appellate review because ‘review on *certiorari* is on the record and the reviewing court may not weigh evidence or review the lower tribunal’s factual findings.’”³ A petitioner for writ of *certiorari* must meet two prerequisites for the Court to grant review: (1) the judgment must be final, and (2) there is “no other available basis for review.”⁴

Should a petitioner meet the two prerequisites, the reviewing court then considers “only those issues historically considered at common law; namely, whether the lower tribunal (1) committed errors of law, (2) exceeded its jurisdiction, or (3) proceeded irregularly.”⁵

DISCUSSION

Given that the Board’s decision is a final judgment,⁶ and there is no other available basis for review, Petitioners have met the two threshold requirements for the Court to consider these writs of *certiorari*. The main body of the Board’s letter decision for Petitioner Lane, as it was written, is as follows:

²*Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1209-10 (Del. 2008) (quoting *Rash v. Allen*, 76 A. 370, 375 (Del. Super. 1910)).

³*Id.* (quoting *Christiana Town Ctr., LLC v. New Castle Cnty.*, 865 A.2d 521, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004) (TABLE)).

⁴*Id.* (citing *In re Butler*, 609 A.2d 1080, 1081 (Del. 1992)).

⁵*Id.* (citations omitted).

⁶See 11 *Del. C.* § 4122©.

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Pursuant to statute 11, **Del. C. §4122(c)**, the Board of Parole held a hearing on Thursday, May 20, 2010 to review your sex offender tier designation.

Pursuant to statute 11, **Del. C. §4121**, the Board has reviewed your current tier designation and has determined that a Tier I designation is the appropriate level of supervision. The Board's decision was based on the following reasons:

- Stable employment and residence
- Length of time in the community

Please note that all other aspects of the original sentence remain the same.

The Board expects that you will adhere to all tier designation registration requirements as outlined by the State. Please note that any arrest for a sex offense will result in a tier designation adjustment review.

The Board's letter to Petitioner Newhouse differs only in the date of the hearing, which was June 15, 2010, and the reasons for the Tier I designation, which were length of time in the community, no new criminal charges, and impact on family status.

Based on these decisions, Petitioners make three arguments. First, lack of a sufficient record for review on a petition for a writ of *certiorari* requires the matters to be reversed and remanded to the Board. Second, the Board committed an error of law by imposing sex offender registration requirements beyond statutory time limits. Third, the Board violated its own rules by failing to summarily reject the tier designation based on convictions before July 21, 1996.

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The State responds with three arguments.⁷ First, because the Board failed to make the record required for *certiorari* review, the Court should remand the matter back to the Board. Second, the Court should instruct the Board to comply with 11 *Del. C.* § 4122(d). Third, the Court should rule that Board of Parole Rule 26 is now void on its face.

Addressing the first argument of both parties with regard to the sufficiency of the record, “[a] record is sufficient to allow for review on a writ of *certiorari* where the lower tribunal documents its decision and the basis for its decision.”⁸ The Court notes that the Board used exactly the same template for the decision reviewed in *Drake v. Board of Parole* as it did for Petitioners.⁹ In *Drake*, the Court held as follows:

The Board's record is insufficient to permit this Court to conduct a *certiorari* review of its decision. The record provided to the Court does not include a statement of facts sufficient to support the Board's conclusions. Its one page decision makes no mention of the burden of proof applied or the appropriate standard in reaching its conclusion. . . . [The Board's reasons] are conclusions without any supporting factual basis. As such, this is an irregularity properly reviewed on *certiorari*. This Court would simply be speculating if it attempted to determine what evidence the Board used in reaching its two conclusions or who

⁷The State appears to represent the interests of the Department of Justice. The Board of Parole does not appear to be represented in this case.

⁸*Drake v. Bd. of Parole*, 2011 WL 5299666, at *4 (Del. Super. Oct. 25, 2011) (citing *Christiana Town Ctr.*, 865 A.2d 521, 2004 WL 2921830, at *2).

⁹*See id.* at *2 (quoting the substance of the Board of Parole's decision).

provided that evidence.¹⁰

In the case at bar, as in *Drake*, there is no statement of facts and no mention of a burden of proof or appropriate standards in reaching the Board's conclusion. Given that the format of the Board's decisions in Petitioners' cases is virtually identical to the Board's *Drake* decision, the Court finds that the records in these consolidated cases are insufficient for *certiorari* review. Thus, under the issues considered historically at common law on review of a writ of *certiorari*, the Board "proceeded irregularly."¹¹

Reviewing the additional arguments before the Court, both parties find fault with Board of Parole Rule 26. The scope of the Court's *certiorari* review, however, is limited.¹² The Court cannot look behind the face of the record.¹³ The decisions by the Board, which would constitute a portion of the face of the record, state nothing about Rule 26 and how or whether it was used. In fact, in both cases, the Board's decision invoked 11 *Del. C.* § 4122(c) as its basis for hearing Petitioners. Therefore, the Court will not reach a decision concerning Board of Parole Rule 26.

With regard to the parties' two remaining arguments that the Board committed an error of law by imposing sex offender registration requirements beyond statutory

¹⁰*Id.* at *4.

¹¹*See Maddrey*, 956 A.2d at 1214.

¹²*Id.* at 1215-17.

¹³*Id.* at 1215 (citing *Castner v. State*, 311 A.2d 858, 858 (Del. 1973)).

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time limits and that the Board does not have the authority to require offenders to register at a tier other than those specified by 11 *Del. C.* § 4121(d), “[a] decision will be reversed for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has ‘proceeded illegally or manifestly contrary to the law.’”¹⁴

Addressing Petitioner’s argument involving the imposition of sex offender registration requirements beyond statutory time limits, 11 *Del. C.* § 4121 provides clarity. Eleven *Del. C.* § 4121(e)(1) states the requirements for compliance with the registration provisions of 11 *Del. C.* § 4120. For example, a Tier II offender shall comply,

[f]or 25 years following the sex offender’s release from Level V custody, or for 25 years following the effective date of any sentence to be served at Level IV or below, if the person is designated to Risk Assessment Tier II, and is not otherwise required to register for life pursuant to this subsection, except that any time spent at any subsequent period of Level V custody shall not be counted against such 25-year period¹⁵

The Board must remain cognizant of the 11 *Del. C.* § 4121(e)(1) provisions as sex offenders appearing before it may not have been given a Tier designation due to the age of the crime involved, but for all intents and purposes the Tier designation

¹⁴*Christiana Town Ctr.*, 865 A.2d 521, 2004 WL 2921830, at *2 (citing 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW OF COURTS OF THE STATE OF DELAWARE § 939 (1906)).

¹⁵11 *Del. C.* § 4121(e)(1)b.

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may carry no registration requirements due to § 4121(e)(1).

Moving to the final contention, the State argues that the Board does not have the authority to require sex offenders to register at a tier other than those specified by 11 *Del. C.* § 4121(d). The Court is aware from the filings of the parties, which are properly reviewed by this Court,¹⁶ that both Petitioners pleaded guilty to Unlawful Sexual Intercourse in the Third Degree. Under 11 *Del. C.* § 4121(d)(2), Unlawful Sexual Intercourse in the Third Degree is presumptively a Tier II offense. As is noted above, the Board designated Petitioners to Tier I. Therefore, the question before the Court is whether the Board has the power to take such an action.

The State argues that the Board has interpreted its authority to “determine the appropriateness of the Attorney General’s new Risk Assessment Tier designation,” pursuant to 11 *Del. C.* § 4122(d), as providing it the power to exercise discretion or equitable oversight. It is the State’s position that the Board’s role under 11 *Del. C.* § 4122 is to determine whether the Attorney General placed a sex offender in a proper tier as provided by § 4121(d). The State cites *State v. Tenbusch*¹⁷ and *Helman v. State*¹⁸ in support of its position.

In *Tenbusch*, the trial court addressed the Tier designation of an out of state sex

¹⁶*See Maddrey*, 956 A.2d at 1216 (“That record is nothing more than the initial papers, limited to complaint initiating the proceeding, the answer or response (if required), and the docket entries.”).

¹⁷2010 WL 3447679 (Del. Super. Aug. 30, 2010), *aff’d*, 21 A.3d 597, 2011 WL 1938266 (Del. May 19, 2011) (TABLE).

¹⁸784 A.2d 1058 (Del. 2001).

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offender who moved to Delaware.¹⁹ Part of defendant’s argument in the case was that the Board of Parole had the authority to exercise discretion in assigning a defendant’s Tier designation.²⁰ The trial court found that the Attorney General was asking the Court for a tier designation, not the Board, and as such, the argument did not have merit.²¹ The trial court went on to say in *dicta*, “Defendant’s argument that the Court is bound by the mandatory tier designations pursuant to § 4121(d), but the Board of Parole is not so bound is not supportable by the statute or any other authority.”²² After reviewing briefs and hearing oral argument, the Delaware Supreme Court affirmed “on the basis of and for the reasons assigned by the Superior Court in its decision”²³

In the context of addressing the constitutionality of Delaware’s Sex Offender Registration Statute as it applies to juvenile sex offender tier designations by a court, the Delaware Supreme Court stated in *Helman*:

The statute clearly delineates the tier to which a sex offender is to be assigned based on the particular offense for which that individual was convicted and mandates assignment to that Tier level without any regard to the facts or circumstances of the particular case. In essence, the

¹⁹2010 WL 3447679, at *1. The State’s motion to designate was pursuant to 11 *Del. C.* § 4121(n). *Id.*

²⁰*Id.* at *2.

²¹*Id.*

²²*Id.*

²³21 A.3d 597, 2011 WL 1938266, at *1.

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statute is offense driven without regard to mitigating factors of the offender or the offense.²⁴

The *Helman* Court went on to say, “There is . . . no discretion to be exercised by the trial court or other State personnel at the administrative level.”²⁵

Petitioners acknowledge that the *Tenbusch* Court stated that the Board had no discretion in determining Tier designations. Nevertheless, they argue that the statement was *dicta* and that language of the statute supports the Board’s exercise of discretion. Specifically, Petitioners cite, with emphasis, a particular portion of 11 *Del. C.* § 4122(c): “Any sex offender redesignated to a Risk Assessment Tier pursuant to this section shall have the right to request that the Board of Parole review and *finally determine such designation.*”

The Court agrees that the *Tenbusch* Court’s statement was *dicta*. The Court notes, however, that the Delaware Supreme Court had the opportunity to comment on the case and chose to affirm, unreservedly, based on the trial court’s reasoning. The *Helman* Court did not mince words with regard to the complete lack of discretion by Superior Court in assigning Tier designations. Furthermore, this Court does not believe that the language of 11 *Del. C.* § 4122(c) lends any credence to Petitioners’ argument for the Board’s discretion.

²⁴784 A.2d at 1066 (citation omitted).

²⁵*Id.* at 1069. At the time that the Delaware Supreme Court decided *Helman*, 11 *Del. C.* § 4122 existed in its current state with the exception of an amendment to § 4122(a), which removed a previously imposed time limitation. *See* 71 *Del. Laws* ch. 429, § 2 (1999), *amended* by 76 *Del. Laws* ch. 374, § 25 (2008).

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A plain reading of the language cited by Petitioners is more susceptible to the meaning that the Legislature intended to make clear that there are no appeal rights from the Board's decision, not that the Board has discretion. Further, Petitioners' argument is not tenable when placed in the context of the court opinions above and the statute as a whole. Petitioners ask the Court to hold that the Board of Parole may exercise its own discretion in determining their Tier designations when the Court, which is in the business of exercising discretion in countless areas, is not permitted to do so.²⁶ If the Legislature intended to take the step of allowing the Board of Parole to weigh various factors in order to exercise discretion, it would have been clearer in doing so. In fact, in the context of redesignation to lower tiers by this Court, the Legislature was very specific in stating the offenders who are eligible, the factors to be weighed, and the burden of proof.²⁷ There are no similar provisions to guide the Board of Parole.

Therefore, on the basis of the analysis above, the Court finds that the Board of Parole does not have the power to exercise discretionary or equitable oversight of the Attorney General's determination pursuant to 11 *Del. C.* § 4122. Instead, the Board must simply act as an administrative check for the requirements of 11 *Del. C.* § 4121 to ensure that the Attorney General did not mistakenly place an offender in the wrong tier or require an offender to register after his or her registration period has expired.

²⁶*Helman*, 784 A.2d at 1069.

²⁷*See* 11 *Del. C.* § 4121(e)(2).

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CONCLUSION

Based on the Board of Parole's insufficient record and its proceeding manifestly contrary to the law, its decisions in these two cases are hereby reversed and remanded for further proceedings consistent with this opinion. As the Board was apparently unrepresented before the Court in this proceeding, this opinion does not take effect for a period of thirty (30) days. During this period, the Board may submit argument based on the decision of the Court.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary
Andre M. Beauregard, Esquire
James T. Wakley, Esquire
Dwight Holden, Board of Parole