

Petitioner, Albert Drake, filed a writ of *certiorari* seeking review of a decision by the Delaware Board of Parole (the “Board”) dated December 16, 2009. In that decision, the Board accepted the recommendation of the Department of Justice and determined that a Tier III sex offender designation is appropriate for Drake. Because the Board did not create an adequate record to allow for *certiorari* review, its decision is **REVERSED** and **REMANDED**.

Factual Background and Procedural Posture

On October 3, 1994, Drake pled guilty to one Count of Unlawful Sexual Intercourse in the First Degree¹ and one count of Unlawful Sexual Contact in the Second Degree (involving his young daughter).² Drake was sentenced to twenty-seven years at Level V suspended after fifteen years for the balance to be served at Level III. He was transitioned to Level IV work release in July 2006 and conditionally released from Level IV on November 21, 2006. Finally, on September 9, 2008, Drake was discharged from conditional release to begin serving the remainder of his sentence on Level III probation.

The Department of Justice sent Drake a letter on March 5, 2009 informing him that the laws for Sex Offender Registration have changed and he would be required to have a tier designation.³ The letter further informed Drake that his conviction for Sexual

¹ 11 *Del. C.* § 775 (Repealed by 71 Del. Laws, c. 285, §§ 12 and 13, eff. Sept. 9 1998).

² 11 *Del. C.* § 768.

³ Letter from Allison Texter, Deputy Attorney General, Department of Justice, to Albert
(continued...)

Intercourse First Degree required an assignment to Tier III – which contains the most strict requirements of the three tiers. Challenges to the Department of Justice’s tier designation are heard by the Board after proper notice.

Drake notified the Board of his intent to challenge his designation as a Tier III sex offender.⁴ Drake was not represented by counsel at any time during the proceeding before the Board. The Department of Justice provided its position to the Board by letter dated May 13, 2009. It argued that Drake should be classified as a Tier III sex offender because the crime to which he pled guilty, if committed today, would require a Tier III status and would not be reviewable until 25 years from the date of his release from Level V, which would be in 2031.

Drake submitted his response to the Board, also by letter, on November 14, 2009. He disagreed with the Department of Justice’s recommendation for a Tier III sex offender designation. Drake requested that the Board consider the following: (1) while on work release he obtained employment and worked there until he was moved to Level III conditional release in November 2006, (2) he obtained new employment which he has held to the date of his letter, (3) he has maintained a stable residence for three years, (4) he has

(...continued)

Drake, Petitioner (March 5, 2008) (the letter is actually dated March 5, 2008; however, the letter appears to have been written on March 5, 2009 because of the date of the received stamp on the letter and the date of Drake’s reply – March 30, 2009).

⁴ Letter from Albert Drake, Petitioner, to Dwight Holden, Chairman, Board of Parole (November 14, 2009).

rebuilt his credit rating, (5) he has not had any violations or police contact, (6) the offense to which he pled guilty was not intercourse with his daughter committed “with force”, (7) the offense was really incest (since it was his daughter), (8) the offenses to which he pled guilty involved his children, and therefore, he is not a risk to the general public, (9) he participated in mental health treatment while incarcerated, allowing him to identify the causes of his behavior resulting in the convictions, (10) he has been identified by his probation officer as “low risk,” and (11) if he is a risk it is only to his family, his own children, but they are now in their thirties.

The Board held a hearing on December 15, 2009 to review Drake’s sex offender tier designation. After the hearing, the Board notified Drake of its decision to accept the recommendation of the Department of Justice and re-designate him as a Tier III sex offender. The Board’s decision stated:

Pursuant to statute 11 Del. C. § 4122(c), the Board of Parole held a hearing on Tuesday, December 15, 2009 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 III designation is appropriate. The Board’s decision was based on the following reasons:

- Minimization of the offense
- Too short of time in community.⁵

⁵ Letter from Dwight F. Holden, Chairperson, Board of Parole, to Albert Drake, Petitioner (December 16, 2009).

Drake, after retaining counsel to represent him, first filed a direct appeal in this Court to challenge the decision of the Board. The Court requested briefing from the parties on the limited issue of the Court's jurisdiction to hear an appeal from the Board. Following briefing, the Court dismissed Drake's appeal without prejudice to allow him to seek review by means of a writ of *certiorari*.⁶ Drake subsequently sought review of the Board's decision by writ of *certiorari*. Thereafter, the Board provided this Court with the limited record for *certiorari* review and Drake and the Board have each briefed the issues.

Parties' Contentions

Drake argues this Court should reverse the Board's decision designating him a Tier III sex offender and enter an order designating him a Tier II sex offender. Drake seeks this relief because he claims the Board erred by failing: (a) to articulate in the record which party had the burden of proof at the December 15, 2009 hearing, (b) to articulate in the record what burden of proof it applied in its decision to designate Drake a tier III sex offender, and (c) to articulate in the record facts used to reach its decision. He suggests the Court should designate him a Tier II sex offender.

The Board contends that this Court should affirm the Board's decision to designate Drake at Tier III. The required burden of proof in tier designation hearings is set by Board rule and its rulemaking authority is created by statute. Therefore, the Board concludes it was aware of the required burden of proof from its own Rule, which

⁶ *Drake v. State*, 2010 WL 3706874 (Del. Super. Sep. 14, 2010).

establishes the burden, and it was not necessary for it to specifically identify the burden used at Drake’s hearing. It also asserts that the material facts required for its conclusion were provided in the decision. Finally, instead of designating Drake a Tier II sex offender the Board argues that the only remedy, if the record is insufficient, is to remand the matter to the Board to cure any defects in the record.

Standard of Review

A writ of *certiorari* is a common law writ that allows a higher court to review the record from a lower tribunal.⁷ Before the Court can conduct a review of a lower tribunal, the petitioner must satisfy two threshold conditions: the judgment must be final and no other basis for review is available.⁸ On a writ of *certiorari*, the Court may only review errors that appear on the face of the record.⁹ The Court may not weigh evidence or review the lower tribunal’s factual findings,¹⁰ and the Court does not review a case on its merits.¹¹ The Court may only consider “those issues historically considered at common law; namely, whether the lower tribunal (1) committed errors of law, (2) exceeded its

⁷ *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1213 (Del. 2008).

⁸ *Id.*

⁹ *395 Assocs., LLC v. New Castle County*, 2006 WL 2021623, at *3 (Del. Super. Jul. 19, 2006).

¹⁰ *Id.*

¹¹ *Reise v. Bd of Building Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000).

jurisdiction, or (3) proceeded irregularly.”¹² Reversal is warranted for errors of law when the record affirmatively shows the lower tribunal acted contrary to law or proceeded illegally.¹³ The lower tribunal will be reversed on jurisdictional grounds “only if the record fails to show that the matter was within the lower tribunal’s personal and subject matter jurisdiction.”¹⁴ Finally, the decision will be reversed for irregularities in the proceeding if the lower tribunal fails to create an adequate record for review.¹⁵ Just as the scope of review for a writ of *certiorari* is limited, the Court’s power is also limited. After review, the Court has the power to quash, affirm or remand the proceedings.¹⁶

Discussion

The Board’s decision is a final judgment and there exists no basis for relief other than a writ of *certiorari*.¹⁷ Therefore, this Court must conduct a limited *certiorari* review of the record to determine whether the Board committed errors of law, exceeded its jurisdiction or proceeded irregularly.

¹² *Maddrey*, 956 A.2d 1204 (Del. 2008).

¹³ *Id.*

¹⁴ *Id.* (quoting *Christiana Town Ctr., LLC. v. New Castle County*, 2004 WL 2921830 (Del. Dec. 16, 2004)).

¹⁵ *395 Assocs.*, 2006 WL 2021623, at *3.

¹⁶ *Id.*

¹⁷ *Drake v. State*, 2010 WL 3706874.

Before conducting an analysis of Drake's claim, an overview of the statutory scheme is necessary. Sex offenders are a defined group of people.¹⁸ By virtue of the particular offense they have committed, they are designated to one of three Risk Assessment Tiers.¹⁹ Based on the Tier designation, the offender has specified duties to register with various authorities and remain registered for varying lengths of time based on his or her Tier designation.²⁰ Authority to assign Tier levels was given to the judiciary effective March 1, 1999.²¹ That authority included doing the assigning at the time of sentencing,²² retroactively to offenses going back to June 27, 1994,²³ or upon a violation of probation if no Tier level had been assigned at the time of original sentence.²⁴

There were a number of offenders for whom there was no designation and the authority to assign a tier level designation was given to the Board.²⁵ The Board's authority to act is only triggered, however, by the Attorney General sending an offender a notice of

¹⁸ 11 *Del. C.* § 4121(a)(4).

¹⁹ 11 *Del. C.* § 4121(d).

²⁰ 11 *Del. C.* §§ 4120 and 4121.

²¹ 11 *Del. C.* § 4121(c); 71 *Del. Laws* ch. 429 (1999).

²² 11 *Del. C.* § 4121(b).

²³ 11 *Del. C.* § 4121(a)(4).

²⁴ 11 *Del. C.* § 4121(c).

²⁵ 11 *Del. C.* § 4122.

a “Tier re-designation.”²⁶ The offender can dispute that “re-designation” and obtain a Board hearing.²⁷ The Board is statutorily authorized to adopt “reasonable regulations” to provide for the hearing process. The Board adopted Rule 26 to do that.²⁸

Drake seeks reversal of the Board’s decision alleging irregularities in the proceeding. Specifically, he claims the Board erred by failing to create a reviewable record, which should have included the burden of proof applied and who prevailed. A decision will be reversed for irregularities in the proceeding if the lower tribunal fails to create an adequate record sufficient to permit limited *certiorari* review.²⁹ A quasi-judicial tribunal must state the basis for its decision in order to create an adequate record and allow

²⁶ 11 *Del. C.* § 4122(b).

²⁷ 11 *Del. C.* § 4122(c).

²⁸ **Sex Offender Risk Assessment Tier Designation Review:** Pursuant to 11 *Del. C.* § 4122, sex offenders identified under 11 *Del. C.* § 4121(a) and convicted after July 21, 1996, but before March 1, 1999, will be assigned by the Attorney General to a new Risk Assessment Tier designation. Upon notification of the re-designation by the Attorney General, the offender may request the Board of Parole to review and finally determine the designation. The offender’s request for review shall be made in writing and delivered to the Board within 10 days of receipt by the offender of the notice. Within 30 days of receipt of the request, or as soon as practicable thereafter, the Board of Parole shall schedule a hearing, notifying the Attorney General and the offender of the date and their right to be heard. The Board of Parole shall not grant a re-designation unless the sex offender establishes, by a preponderance of evidence, that public safety does not require the original designation. The re-designation request will be granted only upon favorable vote of the majority of the Board members present and voting (Adopted May 20, 1999).

²⁹ *Christiana Town Ctr., LLC v. New Castle County*, 865 A.2d 521, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004)(TABLE).

judicial review.³⁰ The reviewable record is sufficient or adequate for review if it includes a fair statement of the conclusions of the lower tribunal as well as the facts material to show the grounds for those conclusions.³¹ In order to permit review, a lower tribunal's record should include a short statement of the decision that explains who prevailed and the burden of proof applied.³²

The determination of whether a lower court or tribunal created an adequate record for review requires an individual determination based on the record in each case. It is helpful to review prior decisions that have addressed the record required for *certiorari* review. In *Matter of Butler*, the lower court failed to create an adequate record for review.³³ In vacating the lower court's decision, The Delaware Supreme Court found manifest error of law apparent from the face of the record where the trial judge failed to recite facts in support of his findings.³⁴ Similarly, in *Reise v. Board of Building Appeals of the City of Newark*, the Delaware Supreme Court reversed and remanded a decision because the board of building appeals failed to create a sufficient record of the reasons for

³⁰ *Reise v. Bd. of Bldg. Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000).

³¹ *395 Associates*, 2006 WL 2021623, at *5.

³² *Maddrey*, 956 A.2d at 1215.

³³ 609 A.2d 1080, 1083 (Del. 1992).

³⁴ *Id.*

its decision.³⁵ A decision must be reversed and remanded if the petitioner's allegations are properly reviewable on a writ of *certiorari* but the lower tribunal's record is not adequate to allow the Court to conduct its proper review.³⁶

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.³⁷ In *Christiana Town Center, LLC v. New Castle County*, the lower tribunal's decision was not disturbed because the board prepared a written decision outlining the reason for its decision and explicitly ruling against petitioner's arguments.³⁸ In *Maddrey v. Justice of the Peace Court 13*, the record was sufficient where the Justice of the Peace Court created a docket entry reflecting who prevailed and the burden of proof applied.³⁹ Similarly, in *395 Associates*, the record was sufficient because the lower tribunal created a type written transcript of the hearing and a written decision.⁴⁰ The written decision included conclusions and facts material to show the grounds for its conclusions.⁴¹

³⁵ 746 A.2d at 274.

³⁶ *See Id.*

³⁷ *Christiana Town Ctr., LLC v. New Castle County*, 865 A.2d 521, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004)(TABLE).

³⁸ *Id.*

³⁹ 956 A.2d at 1215.

⁴⁰ 2006 WL 2021623, at *5.

⁴¹ *Id.*

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. Instead the board only provides two reasons in reaching its decision – "Minimization of offense" and "Too short of time in community." These 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 provided that evidence.

The Board argues that the Court should infer that the appropriate burden of proof was applied because Board Rule 26 places the burden on the offender to establish by a preponderance of the evidence that public safety does not require the original designation. Because of its Rule, the Board would have been aware of the required burden and it is not necessary to be specifically stated in its decision, it concludes. This Court does not draw the same conclusion as the Board. Prior cases discussing the adequacy of a record for *certiorari* review require that the record contain some means for the reviewing court to determine who prevailed and the burden of proof applied. The Board's record is lacking in this regard. The Board's decision does not even mention "public safety" in its relationship to the two conclusory findings it made.

It should be noted that the Board also provided many other documents with the record. These other documents were presumably used by the Board in reaching its decision. However, the Board's decision does not make reference to these documents or state its reliance on them. The Court will not make factual findings or weigh the evidence provided to the Board. This decision is based solely on the Board's December 16, 2009 decision. The Court further notes that nothing in this decision should be taken as a statement of this Court's opinion regarding the appropriate Tier designation for Drake.

The record is insufficient to conduct *certiorari* review of the Board's Tier designation decision. In order to allow Drake and other similarly situated individuals a proper review of the Board's decision, the Board should provide its decision including facts sufficient to support its decision. In addition, the Board should also include a statement of the burden of proof applied and its applicability to the issue of public safety. These items will provide a sufficient record to allow this Court to conduct even the limited *certiorari* review of the Board's decision.

Further on remand, the record needs to be clarified regarding Drake's original designation. Section 4122 speaks in terms of "re-designation" (subsections (b) and (d)), but also in terms of "designation" (subsection (c)). The legislative history of § 4122 hints that there were sex offenders who never were assigned a tier level at sentencing and this section was enacted to have the Board do so upon the initiative of the Attorney General

(without which the Board has no authority to act). Drake's offense, unlawful sexual intercourse first degree, has always been a Tier III designation.

Conclusion

For the above-listed reasons, the Board's December 16, 2009 decision is **REVERSED** and **REMANDED** for further proceedings consistent with this decision.

IT IS SO ORDERED.

J.