

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000588-MR

MARK M. BROWN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01738

KENTUCKY PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES. KNOPF,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Appellant Mark Brown has appealed from the Franklin Circuit Court's order awarding summary judgment to the Parole Board of the Commonwealth of Kentucky (the "Board") and affirming the Board's decision

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

requiring appellant to serve the remainder of his sentence and denying him parole. Because the trial court properly upheld the Board's decision, we affirm.

Appellant was convicted in 1976 of conspiracy to commit murder and was sentenced to twenty years' imprisonment. In 1978, he was convicted of promoting contraband in the second degree. In October 2006, he was convicted of escape in the second degree and of being a persistent felony offender ("PFO"), second degree, and sentenced to five years' imprisonment to run consecutively with any other felony sentence as a result of the PFO conviction.

Appellant has been in and out of prison since his initial commitment to the Department of Corrections in 1976. He was initially paroled in 1981, but had his parole revoked in 1983 for technical parole violations. His parole was reinstated in 1984, and then revoked again in 1998 as a result of a new drug offense, for which he served time in the Ohio Department of Corrections. His parole was reinstated again in late 1998, and then subsequently revoked in 2006 due to an incident in 2000 in which appellant escaped from the Bracken County Courthouse through a window after being arrested for technical parole violations. After his escape, he fled to Florida, where he stayed until he was rearrested and returned to custody in connection with the charges arising from his escape.

In August 2008, the Board denied appellant parole and ordered that he serve the remaining ten years of his sentence. Appellant filed a request for

reconsideration with the Board, which was denied. Appellant thereafter filed a petition for review of the Board's order with the Franklin Circuit Court, and the Parole Board filed a motion for summary judgment. The trial court granted summary judgment in favor of the Board. This appeal followed, in which appellant argues that the Board's decision was arbitrary and capricious, and in violation of his United States and Kentucky constitutional rights, as well as applicable regulations pertaining to decisions of the Board.

When a trial court grants a motion for summary judgment, the relevant standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corporation.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). The party opposing summary judgment must present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must “view the evidence in the light most favorable to the nonmoving party[.]” *Id.* (quoting *Steelvest*, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, “an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436.

With these standards in mind, we will examine appellant's claims of error. Appellant first claims that the Board relied on factors that only duplicate the

elements of the offense and which the Board did not regard as sufficient to deny parole on three earlier separate occasions, and thereby violated the U.S. and Kentucky constitutions as an arbitrary and capricious exercise of power. Appellant also argues that the Board's decision contained procedural errors under 501 Kentucky Administrative Regulations (KAR) 1:030(4), the regulation applicable to the Board's decisions.

An order of the Board is only reviewable for compliance with the terms of the Parole Code. KRS 439.330(3). Further, Kentucky courts have stated that a Kentucky inmate has no constitutionally protected interest in parole, stating that "Kentucky's statute and the regulations promulgated pursuant thereto have not elevated parole to a liberty interest in which inmates have a legitimate claim of entitlement. In Kentucky, parole is a matter of legislative grace." *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584, 587 (Ky. App. 1996) (citing *Fowler v. Black*, 364 S.W.2d 164 (Ky. 1963). "Parole is simply a privilege and the denial of such has no constitutional implications." *Land v. Com.*, 986 S.W.2d 440, 442 (Ky. 1999) (citing *Morris v. Wingo*, 428 S.W.2d 765 (Ky. 1968), and *Tiryung v. Com.*, 717 S.W.2d 503 (Ky. App. 1986)).

A prisoner does have "a legitimate interest in a decision rendered in conformity with the established procedures and policies; one which is based upon consideration of relevant criteria." *Belcher*, 917 S.W.2d at 587. However, "[u]nlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual." *Id.* (citing *Greenholtz v. Inmates of*

668 (1979)). As stated by this Court:

While the statute and regulations entitled [the prisoner] to review, even a finding that certain relevant criteria have been met does not require the Board to release him prior to the expiration of his sentence. Nothing in the statute or the regulations mandates the granting of parole in the first instance, and nothing therein diminishes the discretionary nature of the Board's authority in such matters.

Belcher, 917 S.W.2d at 586 (citing *Adams v. Ferguson*, 386 S.W.2d 462 (Ky. 1965); *Willard v. Ferguson*, 358 S.W.2d 516 (Ky. 1962); KRS 439.310 *et seq.*; 501 KAR 1:030-1:050).

Here, the Board's reasons for denying appellant parole were: (1) the seriousness of the crime; (2) that violence was involved; (3) that a life was taken; (4) that the crime involved a firearm; and (5) that a crime was committed while on parole. Appellant asserts that the Board only considered factors that were present and considered at conviction, and that the Board did not consider certain factors included in the regulation, resulting in a decision that was arbitrary and capricious, and therefore unconstitutional. As a factual matter, however, there is no evidence that the Board did not consider all the statutory factors and conclude that the seriousness of the crime committed, as well as the fact that additional crimes were committed while on parole, were more substantial than the other considerations. Nothing in the statute or regulations mandates that the Board specify every factor that it considers in coming to its ultimate decision.

Even if the Board only considered the five factors that it ultimately relied upon when making its decision, the Court still has no reason to find the decision to be contrary to Kentucky law. The regulation governing the criteria for parole provides that, “the [B]oard shall apply one (1) or more of the . . . factors” in making its determination to recommend or deny parole. 501 KAR 1:030(4)(1)(a)-(p). One of those factors is the seriousness of the current offense, whether violence was involved, whether a firearm was used, and whether a death occurred. 501 KAR 1:030(4)(1)(a). Therefore, the Board followed the procedure required for parole decisions, because it applied one of the factors listed in the regulation. For example, the Court in *Belcher* upheld the Board’s decision where the only criterion cited as the basis for the Board’s denial of parole was the “seriousness of the crime.” *Belcher*, 917 S.W.2d at 587-588. While Appellant contends that it is arbitrary and capricious to deny parole under these circumstances, and in contravention of established statutes and regulations, no Kentucky law is cited to sustain this proposition.

Based on the foregoing, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Margaret O’Donnell
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Amy V. Barker
Frankfort, Kentucky

