RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002345-MR

ROY ALLEN BROCKETT JR. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-00402

KENTUCKY PAROLE BOARD,
JUSTICE AND PUBLIC SAFETY
CABINET — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,[1] SENIOR JUDGE.

VANMETER, JUDGE: Roy Allen Brockett Jr. appeals *pro se* from an order of the Franklin Circuit Court, entered November 21, 2008, dismissing his petition for a writ of mandamus. For the following reasons, we affirm.

[1] Senior Judge William R. Harris 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.

Brockett currently is serving a sentence of life imprisonment. When he became eligible for parole in 2002, after serving ten years, he appeared before the Kentucky Parole Board for a parole review hearing. The Board denied parole and deferred his case for 60 months.

In 2007, Brockett appeared before the Board again. This time, the Board denied parole and deferred his case for 40 months. Thereafter, Brockett sought to obtain the audio record of the 2002 hearing, maintaining that the 2002 Board had promised him parole at the next hearing if he completed educational courses, maintained a clear record, attended Narcotics Anonymous, and arranged for housing and employment (all of which Brockett evidently had done by the time of the 2007 hearing).[2] However, since audio records of Board hearings are discarded after 18 months, pursuant to the Board's retention policy, the record of the 2002 hearing was unavailable.

The Board denied Brockett's request for reconsideration of his case. Brockett then petitioned the Franklin Circuit Court for a writ of mandamus to compel the Board to conduct a reconsideration hearing comporting with due process requirements. Brockett maintained that the Board abused its discretion by denying parole and thereafter by denying his request for a reconsideration hearing, without reviewing the record of the 2002 hearing. In its order denying Brockett's petition for a writ of mandamus, the court opined, in part, that any alleged

[2] Apparently, the 2007 Board was comprised of members who were not part of the 2002 Board.

statements made by the 2002 Board did not create a liberty interest so as to justify invoking the extraordinary remedy of mandamus. This appeal followed.

Brockett argues that his due process right to a fair parole hearing was violated when the 2007 Board failed to review and consider all pertinent information relating to his case before denying parole and reconsideration. We disagree.

The Board shall "[s]tudy the case histories of persons eligible for parole, and deliberate on that record[.]" KRS 439.330(1)(a). Before granting the parole of any prisoner,

> the board shall consider the pertinent information regarding the prisoner and shall have him appear before it for interview and hearing. . . . A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

KRS 439.340(2). We note that the "statute itself does not codify procedural due process requirements; instead, it limits and imposes restrictions upon the granting of parole." *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584, 586 (Ky.App. 1996).

KRS 439.340(3) further requires the Board to adopt administrative regulations regarding the eligibility of prisoners for parole. Accordingly, 501 KAR[3] 1:030

[3] Kentucky Administrative Regulations.

addresses the criteria for determining parole eligibility. In addition, KRS 439.330(4) requires the Board to keep a record of

> its acts, an electronic record of its meetings, a written record of the votes of individual members, and the reasons for denying parole to inmates. These records shall be public records in accordance with KRS 61.870 to 61.884.

KRS 439.330(4) does not specify the period of time for which the Board is required to maintain copies of audio records of its hearings.

Brockett construes KRS 439.340 as imposing a mandatory duty upon the Board to parole all inmates who satisfy the eligibility criteria set forth therein. However, as held by a panel of this court in *Belcher*, "the statute does not . . . create a protected liberty interest in parole." 917 S.W.2d at 585. Rather, as noted by the trial court below, even if the 2002 Board had promised Brockett parole if he satisfied certain conditions, no liberty interest was created since "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 586 (citing *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979)). In other words, the "mere existence of a statutory possibility of parole does not mean the full panoply of due process required to convict and confine must be employed by the Board in deciding to deny parole and continue confinement." *Id.* Although the statute allows parole review by the Board, "even a finding that certain relevant criteria have been met does not require the Board to release [an inmate] prior to the expiration of his sentence." *Id.* Thus, the 2007

Board's denial of parole without reviewing the record of the 2002 hearing did not violate Brockett's due process rights and was not an abuse of its discretion. *See Belcher,* 917 S.W.2d at 587 (stating "[e]ven assuming that [an inmate] had, in fact, complied with the suggestions and recommendations of a previous Board, . . . no authority mandat[es] release by a subsequent Board").

Brockett's claim that the Board abused its discretion by denying his request for a reconsideration hearing is also without merit. The Board may reconsider its denial of parole "if the chair requests the full board to reconsider a decision, the full board votes in writing, and the majority votes in favor of the reconsideration hearing." 501 KAR 1:030 § 4(3). Board appellate review of a Board decision may be requested by an "inmate whose parole is revoked, rescinded or denied by deferment or serve-out[.]" 501 KAR 1:030 § 4(4). Such a request "shall be screened by a board member or his designee to decide if a review shall be conducted[,]" and a review shall be conducted:

> (a) If there is an allegation of misconduct by a board member that is substantiated by the record;
> (b) If there is a significant procedural error by a board member; or
>
> (c) If there is significant new evidence that was not available at the time of the hearing. A request based on the availability of new evidence or information shall be accompanied by adequate documentation.

Id.

The aforementioned provisions do not contain mandatory language establishing a parolee's unfettered right to a reconsideration hearing, as averred by

Brockett. Rather, the decision of whether to grant a reconsideration hearing falls within the discretion of the Board, guided by established procedures and criteria. We note that

> [d]enial of parole is an administrative function and this Court cannot probe the mind of the Board in order to determine the sufficiency of the reasons. The parole-release decision . . . depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based on their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which if shown, mandate a decision favorable to the individual.

Stewart v. Commonwealth, 153 S.W.3d 789, 791 (Ky. 2005) (citations omitted). Brockett has failed to prove the existence of the limited circumstances under which reconsideration or review may be granted, or to otherwise show that the Board's denial of his request for reconsideration was an abuse of its discretion.

A parole board's alleged abuse of its authority may be addressed through a circuit court proceeding seeking a writ of mandamus to compel the Board to proceed properly. *See Shepherd v. Wingo*, 471 S.W.2d 718, 719 (Ky. 1971). A writ of mandamus is

> essentially a command from a higher court to "stop some action which is threatened by or is being preceded with by an inferior court." It has long been characterized as an "extraordinary remedy" that is granted conservatively and only in "exceptional circumstances." . . . [T]he basic standard of review of the grant or denial of a writ is abuse of discretion, while questions of law are reviewed de novo.

Fletcher v. Graham, 192 S.W.3d 350, 356 (Ky. 2006) (citations omitted).

In the present case, Brockett has not shown that the Board abused its discretion by denying either parole or his request for reconsideration. As such, we find that the trial court did not abuse its discretion by concluding that Brockett was not entitled to the requested writ of mandamus.

The order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Allen Brockett Jr., *Pro se*
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Angela E. Cordery
Frankfort, Kentucky