

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001655-MR

ADRIAN BROWN

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-00028

PAROLE BOARD,
COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Adrian Brown appeals an order of the Franklin Circuit Court dismissing his petition for relief from a decision of the Kentucky Parole Board denying parole and deferring for forty-eight months. The circuit court concluded the Board acted within its discretion in deferring parole for more than twenty-four months because Brown is serving consecutive violent and non-violent

offenses and not entitled to the benefits of Kentucky Revised Statutes (KRS) 439.340(14). We agree and affirm.

In 2004, following a jury trial in the Fayette Circuit Court, Brown was found guilty of first-degree robbery, first-degree burglary and fourth-degree assault. On February 28, 2005, a final judgment and sentence was entered sentencing Brown to ten-years' imprisonment for first-degree robbery and first-degree burglary and twelve months for fourth-degree assault. The sentences were ordered to run concurrently for a total of ten years.

In July 2005, Brown pled guilty in the Fayette Circuit Court to the additional crimes of second-degree manslaughter and first-degree robbery. He was sentenced to five-years' imprisonment on the second-degree manslaughter conviction and ten years on the robbery conviction to run consecutively for a total of fifteen years and to run concurrently with the previously imposed sentences.

On April 3, 2012, Brown was brought before the Board for a parole hearing. The Board denied parole and ordered a forty-eight month deferment.

Brown filed a petition for declaratory judgment in the Franklin Circuit Court arguing that because he is serving sentences for both violent and non-violent offenses, KRS 439.340(14) prohibits the Board from deferring his parole in excess of twenty-four months. The Board filed a motion to dismiss arguing a declaratory judgment is an improper means to challenge the Board's decision and that a writ of mandamus would be the appropriate mechanism. It further contended Brown's action is *res judicata* because the same claims were asserted and rejected in his

action filed in his federal district court action, *Brown v. Chandler*, 2013 WL 6487505 (W.D. Ky. 2013). Finally, challenging the substance of Brown's claims, the Board argued KRS 439.340(14) does not apply because Brown is serving aggregate sentences for violent Class B felonies and non-violent crimes.

Although the circuit court agreed with the Board that a writ of mandamus is the proper mechanism for challenging an alleged abuse of authority by the parole board, it construed Brown's *pro se* pleading liberally and concluded his underlying claim sought relief in the form of a mandamus petition. The circuit court also rejected the Board's argument that Brown's action was barred by *res judicata*, ruling that the federal court did not rule on Brown's state claim regarding the application of KRS 439.340(14). The circuit court then addressed the merits of Brown's claims and ruled the Board acted within its discretion in deferring Brown's parole for forty-eight months because he is serving consecutive sentences for violent and non-violent offenses.¹ Having been denied the relief requested, Brown appealed.

On appeal, the Board presents the same arguments as it did to the circuit court. We agree with the circuit court that Brown's claim should be resolved on its merits. The circuit court properly construed Brown's *pro se* pleading as seeking to compel the Board to comply with statutory law. Additionally, the federal court expressly stated it was not exercising supplemental jurisdiction over Brown's

¹ In its order, the circuit court at times erroneously stated parole was deferred for twenty-four months. However, it is clear from the order it understood parole was deferred for forty-eight months.

claim that the Board violated Kentucky statutes or regulations in deferring his parole. We address the merits of Brown's claim.

Prior to the amendment of KRS 439.340, after the initial review for parole, subsequent review was left to the Board's discretion. Under current statutory law, the Board's discretion has been significantly narrowed.

Enacted in 2011 as part of the Public Safety and Accountability Act and commonly referred to as HB 463, the General Assembly made sweeping and historic changes to Kentucky's penal code including an amendment to KRS 439.340. Section 14 of that statute provides:

If the parole board does not grant parole to a prisoner, the maximum deferment for a prisoner convicted of a non-violent, non-sexual Class C or Class D felony shall be twenty-four (24) months. For all other prisoners who are eligible for parole:

(a) No parole deferment greater than five (5) years shall be ordered unless approved by a majority vote of the full board; and

(b) No deferment shall exceed ten (10) years, except for life sentences.

"Deferment" in this context refers to "a decision by the [Parole Board] that an inmate shall serve a specific number of months before further parole consideration." 501 Kentucky Administrative Regulations 1:030.

Although the amendment to KRS 439.340 restricts the discretion of the Board in deferring parole consideration, the twenty-four month deferral limitation applies only to non-violent, non-sexual Class C or D felonies. Brown was

convicted of two counts of first-degree robbery, a Class B felony and a violent crime, in addition to his other convictions.

KRS 532.120(1) provides for the merger of concurrent sentences and for the aggregation of sentences ordered to run consecutively. We agree with the circuit court's conclusion that because Brown is serving aggregate sentences for violent and non-violent crimes, he is not entitled to parole consideration for his non-violent crimes separate and distinct from his violent crimes. KRS 439.340(14) does not limit the Board's discretion to defer consideration of Brown's parole for forty-eight months.

For the reasons stated, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

John Cummings
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