

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT S. KELLY,

Plaintiff-Appellant,

v

MICHIGAN PAROLE BOARD, and BARB  
SAMPSON, Chairperson of Michigan Parole  
Board,

Defendants-Appellees.

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UNPUBLISHED

October 28, 2010

No. 292836

Ingham Circuit Court

LC No. 09-000293-AW

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting of defendants' motion to dismiss plaintiff's complaint for mandamus and order denying plaintiff's motion for rehearing.<sup>1</sup> We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I

In December 1987, plaintiff was convicted in a bench trial of indecent exposure, MCL 750.335a, and of being a sexually delinquent person, as defined in MCL 750.10a. The circuit court originally sentenced defendant to life in prison, but this Court remanded for resentencing in compliance with the applicable statute, see *People v Kelly*, 186 Mich App 524, 528-529; 465 NW2d 569 (1990), where after plaintiff received a sentence of one day to life. The Board denied plaintiff parole on several occasions, and he has served 22 years thus far.

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<sup>1</sup> We reject defendants' challenge to this Court's jurisdiction over this appeal as of right. Plaintiff initiated the circuit court action with the filing of a complaint for mandamus. Such an action for mandamus is its own original action, not an appeal of the denial by defendant Michigan Parole Board ("the Board"). See MCR 3.305; *Morales v Parole Bd*, 260 Mich App 29, 41-42; 676 NW2d 221 (2003). The circuit court's language characterizing plaintiff's mandamus action as an "indirect" appeal of the Board's decision does not change the fact that a mandamus action in the circuit court (whether meritorious or not) is its own original action, not an appeal.

Following a recent parole denial, plaintiff filed a complaint for mandamus in the circuit court. He argued, among other things, that the reasons given for his denial were not substantial and compelling, as required by MCL 791.233e(6). Plaintiff sought a writ of mandamus to compel the Board to explain why the reasons provided were substantial and compelling, or to compel the Board to grant him parole. He also challenged the Board's jurisdiction, arguing that because he was not sentenced to a minimum in terms of years, his sentence falls outside the Board's jurisdiction under MCL 791.234.

## II

MCL 791.234(1) defines the scope of the Board's jurisdiction over prisoners and states that the Board has jurisdiction over prisoners sentenced with "a minimum in terms of years." The sentence range for the statute under which plaintiff was convicted, MCL 750.335a, is one day to life. Therefore, according to plaintiff, because one day is not a term of years, and given the plain and unambiguous language of MCL 791.234(1), the Board does not have jurisdiction over plaintiff, and plaintiff is being denied the right to be fairly considered for parole. We disagree.

Statutory interpretation is an issue of law that we review de novo. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). We review the circuit court's decision to issue or deny a writ of mandamus for an abuse of discretion. *Id.* Similarly, we review the denial of a motion for rehearing for an abuse of discretion. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004).

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature. . . . If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Casco Twp*, 472 Mich at 571.

The elements that establish whether a writ of mandamus should issue are: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result." *Morales*, 260 Mich App at 41. A prisoner may seek a writ of mandamus to compel compliance with a statutory duty, *id.*; however, "mandamus is an extraordinary remedy and it will not lie to review or control the exercise of discretion vested in a public official or administrative body." *Id.* at 41-42. Mandamus can be used to compel the use of discretion where there is a duty to use discretion, but it cannot be issued to control how that discretion is used. *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984). The decision to grant or deny a prisoner parole is within the discretion of the Board. *Hopkins v Parole Bd*, 237 Mich App 629, 637; 604 NW2d 686 (1999).

MCL 791.234(1) establishes the jurisdiction of the Board:

Except as provided in section 34a, a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time

equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

The express statutory language does include the phrase “term[] of years[,]” and the sentencing minimum for plaintiff’s offense is one day. However, reading the statute literally, as plaintiff suggests, would lead to an absurd result because no mechanism would exist for prisoners like plaintiff to be released from prison aside from pardon or clemency.<sup>2</sup> Neither statutes nor case law indicate that plaintiff’s offense is non-parolable, or falls outside the Board’s jurisdiction. The only way to avoid this absurd result is to conclude that MCL 791.234(1) grants the Board jurisdiction over plaintiff and other similarly situated prisoners. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) (stating that “statutes must be construed to prevent absurd results”).

Plaintiff was considered for and denied parole by the Board. Therefore, the statutory discrepancy has not denied plaintiff the right to be properly considered for parole. Consideration for parole does not guarantee parole because prisoners have no constitutional or inherent right to parole; it is within the Board’s discretion to deny parole. *Morales*, 260 Mich App at 39; *Hopkins*, 237 Mich App at 637. The fact that plaintiff has been denied parole does not mean that he has not been properly considered for parole.

MCL 791.233e(6) establishes that a prisoner with a high probability of parole under the parole guidelines may be denied parole provided that substantial and compelling reasons for this decision are provided in writing.

In order to establish that the circuit court abused its discretion in dismissing plaintiff’s complaint for mandamus, plaintiff would first need to demonstrate that the elements that permit the writ to be issued are met; he has not done so. A writ of mandamus cannot be issued to control the exercise of the Board’s discretion. *Teasel*, 419 Mich at 409-410. The grant or denial of parole is within the discretion of the Board. *Hopkins*, 237 Mich App at 637. The circuit court could not have issued a writ compelling the Board to release plaintiff on parole; the circuit court did not abuse its discretion and properly dismissed plaintiff’s complaint for mandamus.

Moreover, because the facts and circumstances of every parole consideration are different, it is necessarily the case that the determination of what constitutes substantial and compelling reasons for denying parole will be within the discretion of the Board. The Board can only be compelled to provide reasons for denying a prisoner parole in order to fulfill its statutory duty; however, a writ intended to control the Board’s exercise of this discretion in terms of the nature of the reasons themselves cannot be issued. *Teasel*, 419 Mich at 409-410. In this case, the Board provided reasons for its decision and, therefore, fulfilled this duty. The Board cannot be compelled to exercise its discretion in a specific way.

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<sup>2</sup> Plaintiff cites MCL 8.3j, where the Legislature defined the word “year,” but as stated in MCL 8.3, the rules of statutory construction in sections 3a to 3w “shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.”

Plaintiff's motion for rehearing was properly denied; the relief plaintiff sought could not be granted because no error occurred that rehearing could remedy.

Affirmed.

/s/ William B. Murphy

/s/ Jane M. Beckering

/s/ Michael J. Kelly