

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Fehnel, :  
Petitioner :  
 :  
v. : No. 501 M.D. 2008  
 : Submitted: April 1, 2010  
Pennsylvania Department of :  
Corrections; Pennsylvania Board of :  
Probation and Parole, :  
Respondents :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: April 28, 2010

Before this Court are separate motions for judgment on the pleadings filed by the Pennsylvania Department of Corrections (Department) and the Pennsylvania Board of Probation and Parole (Board) in response to the motion for judgment on the pleadings filed by Robert Fehnel (Fehnel), seeking due process from this Court for their failure to release him on parole for five years after granting him parole because they did not have room to place him in a Community Corrections Center (CCC) due to lack of bed space. Because Fehnel has been reparaoled, the matter is moot.

Fehnel is a convicted sex offender who was serving a 10 to 30 year aggregated sentence imposed in August, 1989. His minimum sentence date was February 28, 1999, and his maximum date was calculated as February 28, 2019. After once being granted parole in 1999, Fehnel was recommitted as a technical parole violator. He was then granted reparole to a CCC by the Board in September, 2004, and in September, 2006. Despite the two reparole orders, Fehnel remained incarcerated because there was no space for him at the Region 1 CCC where the Board wanted him to be placed. Based on his lengthy incarceration after a grant of parole, Fehnel filed an original action habeas petition with the Pennsylvania Supreme Court. That petition was denied without prejudice, and Fehnel was directed to seek relief from this Court. Fehnel then filed a petition for review, which he later amended. In his amended petition, Fehnel alleged that the Department had responsibility for placing inmates and that he was referred for placement in Region 1 in October, 2004. Fehnel alleged that he was not placed in a CCC due to lack of space in Region 1. He also alleged that the Department would not place him in a CCC program and discharge him from prison until the Board executed his parole. The Board claimed that it could not execute parole until the Department placed Fehnel in a CCC.

Fehnel further alleged in his amended petition that while he remained incarcerated well after he was found eligible for release, other inmates from Region 1 who were more recently granted parole or reparole were placed in CCCs in Region 1. He also alleged that other similarly situated sex offenders who were granted parole or reparole after Fehnel were placed in CCCs in Region 1 as well as in two other regions. Fehnel asked this Court to issue an order directing the

Department to release him to a CCC and directing the Board to issue a parole release order to him.

The Board filed preliminary objections to the amended petition stating that three paragraphs of the 27-paragraph amended petition were fatally non-specific and requested that Fehnel be ordered to re-plead. It also filed two other preliminary objections to Fehnel's amended petition maintaining that this Court lacked jurisdiction because Fehnel was essentially asking for a writ of habeas corpus and that Fehnel had failed to allege sufficient facts to substantiate a violation of his rights. The Board's final preliminary objection was in the nature of a demurrer and contended that Fehnel had failed to state any due process claim or equal protection claim for which relief could be granted. The Department also filed a preliminary objection based on insufficient specificity.

Fehnel was ultimately released on reparole to CCC #5 on July 13, 2009. On July 14, 2009, the Board filed a suggestion of mootness arguing that this case was moot due to Fehnel's release. This Court denied the Board's suggestion based on Fehnel's averments that this case involved a substantial question that was capable of repetition unless settled. The Board withdrew its preliminary objections and filed an answer with new matter. We overruled the Department's preliminary objection and directed the Department to file an answer within 30 days. Fehnel filed a motion for judgment on the pleadings and summary judgment arguing that summary judgment and judgment on the pleadings were warranted against the Department and the Board due to their refusal to release him on parole for five years after granting him parole; his due process rights had been violated because he

had an objectively reasonable expectation of release from incarceration and a liberty interest protected by the Due Process Clause; and that the Department and Board's treatment of him with respect to other similarly situated sex offenders in other regions and Region 1 resulted in his increased incarceration for arbitrary and irrational reasons in violation of his equal protection rights. In response, the Department and Board filed cross-motions for judgment on the pleadings again, among other issues, raising the issue of mootness.

We now agree with the Department and Board that the matter is moot. This matter has not evaded review and the issues in the motions before us have been substantially addressed. *See Nieves v. Pennsylvania Board of Probation and Parole, and Pennsylvania Department of Corrections and Department of Corrections Community Corrections Center*, (Pa. Cmwlth., No. 113 M.D. 2009, filed April 28, 2010); *Nieves v. Pennsylvania Board of Probation and Parole, and Pennsylvania Department of Corrections and Department of Corrections Community Corrections Center*, 983 A.2d 236 (Pa. Cmwlth. 2009).

Accordingly, Fehnel's motion for judgment on the pleadings and summary judgment is dismissed because the matter is moot. Similarly, the cross-motions for judgment on the pleadings filed by the Department and Board are dismissed. Fehnel's petition for review is also dismissed as moot.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 28<sup>th</sup> day of April, 2010, Robert Fehnel's motion for judgment on the pleadings and summary judgment is dismissed because the matter is dismissed as moot. The cross-motions for judgment on the pleadings filed by the Department of Corrections and the Board of Probation and Parole are dismissed. Robert Fehnel's petition for review is also dismissed as moot.

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DAN PELLEGRINI, JUDGE