

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marcus Quinones,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 668 M.D. 2009
	:	Submitted: June 11, 2010
Commonwealth of Pennsylvania,	:	
Pennsylvania Department	:	
of Corrections,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FLAHERTY                      FILED: September 1, 2010

Before this Court are preliminary objections filed by the Pennsylvania Department of Corrections (DOC) in response to a Petition for Writ of Mandamus filed by Marcus Quinones (Petitioner).<sup>1</sup> We sustain DOC’s preliminary objections and dismiss Petitioner’s Petition.

Petitioner filed the instant Petition in this Court's original jurisdiction. He alleges he is currently confined in the State Correctional Institution at Mahanoy and that he is currently serving a sentence of one year

---

<sup>1</sup> By order of this Court dated June 1, 2010, Petitioner’s brief was stricken for failure to supply sufficient copies of the same. This matter is to be decided based solely on the contents of the record and DOC's brief.

to two years following a conviction for Manufacture/Deliver/Possession/With Intent to Manufacture or Deliver a Controlled Substance. Petitioner contends his sentence has a maximum term expiration date of March 9, 2011, and a minimum term expiration date of March 9, 2010. Petitioner alleges the sentencing court nonetheless imposed a condition of immediate parole. He attached a copy of the trial court's February 13, 2009 sentencing order to his Petition for Writ of Mandamus. That order reads, in part:

The following conditions are imposed:

Immediate parole: Court ordered this defendant paroled immediately on this sentence.

Other- Parole to be under state supervision per Court....

Petition for Writ of Mandamus, Exhibit "C."

According to Petitioner, he has made efforts with the "Authorities in the Records Office, at the State Correctional Institution at Mahanoy, on numerous occasions to faithfully implement the correct judicially imposed sentence of one year to two years with an immediate effective release date of March 9, 2009, as per the condition imposed by the Court for Immediate Parole." Petition for Writ of Mandamus, p. 1. He alleges that these authorities have refused to implement the sentencing order, particularly the condition of immediate parole. Per the Petitioner, DOC lacks the authority to adjudicate the legality of a sentence or to add or delete sentence conditions. Petitioner requests this Court issue an order directing DOC to recalculate his sentence to reflect the condition of immediate parole

under state supervision as indicated in the sentencing order and to provide for his immediate release.

DOC filed preliminary objections to Petitioner's Petition for Writ of Mandamus in the nature of a failure to state a claim upon which relief can be granted (demurrer) and a failure to join a necessary party.

Rule 1028 of the Rules of Civil Procedure provides, in relevant part:

(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

...

(2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;

...

(4) legal insufficiency of a pleading (demurrer);

(5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action...

Pa. R.C.P. No. 1028.<sup>2</sup>

Prior to addressing DOC's preliminary objections, we point out that DOC asserts factual allegations in its preliminary objections. It asserts Petitioner was on parole for another offense at the time he committed his latest offense that resulted in a sentence of one to two years. DOC asserts

---

<sup>2</sup> Pa. R.A.P. 1517 provides that the procedure relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the rules of civil procedure when not prescribed by the rules of appellate procedure.

that on September 14, 2009, the Pennsylvania Board of Probation and Parole (Board) determined that Petitioner violated his parole and recommitted him as a convicted parole violator to serve six months back time on his original sentence. It adds that Petitioner's total unexpired term for his previous sentence was one year and four days. Moreover, DOC contends that its copy of the most recent sentencing order is devoid of any language ordering Petitioner's immediate parole. No "verification" accompanies DOC's preliminary objections.

A preliminary objection is a "pleading." Pa. R.C.P. No. 1017(4). "Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified..." Pa.R.C.P. No. 1024. As indicated, DOC asserts additional factual allegations not contained in Petitioner's Petition for Writ of Mandamus. Nonetheless, Petitioner has not filed his own set of preliminary objections to DOC's preliminary objections. He has not filed a preliminary objection consistent with Pa.R.C.P. No. 1028 contending that DOC's "pleading," as that term is defined in Pa.R.C.P. No. 1017(4), fails to conform to law or a rule of court. Ultimately, these additional facts are not determinative to our disposition in this matter. We will not address this issue further.

Crucial to the disposition of Petitioner's Petition for Writ of Mandamus is the following statutory authority. Section 17 of the Parole Act, Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§331.17 (repealed by Section 11(b) of the Act of August 11, 2009, P.L. 47, effective in 60 days), provided:

The Board shall have exclusive power to parole and reparole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison, or penal institution, as hereinafter provided... Provided, however, That the powers and duties herein conferred shall not extend to persons sentenced for a maximum period of less than two years, and nothing herein contained shall prevent any court of this Commonwealth from paroling any person sentenced by it for a maximum period of less than two years....

61 P.S. §331.17 (repealed).

Section 26 of the Parole Act stated:

Paroles from imprisonment for less than a maximum period of two years shall be granted by the sentencing court and shall... be without supervision by the Board.

61 P.S. §331.26 (repealed).

While these provisions have since been repealed, they were in effect at the time the trial court entered its sentencing order on February 13, 2009. Moreover, a newly enacted statute establishing the powers and duties of the Board reads as follows:

(a) GENERAL RULE. --The board shall have exclusive power:

(1)(i) To parole and reparole, commit and recommit for violations of parole and to discharge from parole all persons sentenced by any court at any time to imprisonment in a correctional institution

...

(2)(ii) Except for... special cases, the powers and duties conferred by this section shall not extend to persons sentenced for a maximum period of less than two years...

(b) CONSTRUCTION. --Nothing contained in this section shall be construed to prevent *a court from paroling any person sentenced by it for a maximum period of less than two years....*

61 Pa.C.S. §6132 (emphasis added).

Both the current statutory scheme and the former statutory scheme in effect at the time the trial court issued its sentencing order vests parole authority with the Board inasmuch as the Board, under either statutory scheme, retains exclusive parole authority over prisoners serving a maximum sentence of two years or more.<sup>3</sup> As alleged in Petitioner's Petition for Writ of Mandamus, he was sentenced by the trial court to a maximum sentence of two years. With this in mind, we turn to DOC's preliminary objections.

## **I. Failure to State a Cause of Action Upon Which Relief Can Be Granted (Demurrer)**

---

<sup>3</sup> Inasmuch as both statutory schemes limit a court's authority to parole an individual to those sentenced by it to a maximum period of less than two years, this Court sees no difficulty applying case law interpreting the former Parole Act to the newly enacted 61 Pa.C.S. §6132 and vice versa. Our statement is meant to apply to one of the issues present in this matter; *i.e.*, whether the Board is vested with exclusive authority to order a prisoner paroled who is sentenced to a maximum period of confinement of two years.

It is well-settled that when reviewing preliminary objections in a case filed in our original jurisdiction, this Court must consider as true, all well-pled facts that are material and relevant. Ruby v. Department of Transportation, 632 A.2d 635 (Pa. Cmwlth. 1993). Preliminary objections should be sustained only where it is clear and free from doubt that the law will not permit recovery. Id. at 636.

“Mandamus is an extraordinary writ that will lie only to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate or adequate remedy.” Chanceford Aviation Props., L.L.P. v. Chanceford Township Bd. of Supervisors, 592 Pa. 100, 114, 923 A.2d 1099, 1107-1108 (2007)(citing Jackson v. Vaughn, 565 Pa. 601, 777 A.2d 436 (2001)). It may not be used to direct the exercise of judgment or discretion in a particular way. Pennsylvania Dental Ass’n v. Commonwealth Ins. Dep’t, 512 Pa. 217, 516 A.2d 647 (1986).

Parole is a matter of grace. Myers v. Ridge, 712 A.2d 791 (Pa. Cmwlth. 1998). The General Assembly granted the Board exclusive power to parole and discharge from parole all individuals imprisoned by a court in a correctional institution.<sup>4</sup> Jones v. Office of Open Records, 993 A.2d 339 (Pa. Cmwlth. 2010). What the Board decides, and why, being wholly a matter of the Board’s discretion, is not subject to judicial review. Myers, 712 A.2d at 794. It is for the Board alone to determine whether or not a prisoner is sufficiently rehabilitated to serve the remainder of his sentence

---

<sup>4</sup> Conversely, the DOC is responsible for calculating the minimum and maximum terms of prisoners committed to its jurisdiction. Nickson v. Pennsylvania Board of Probation and Parole, 880 A.2d 21 (Pa. Cmwlth. 2005).

outside the confines of prison. Id. Mandamus will not be used to direct the Board to exercise its judgment or discretion in a particular way. Nickson, 880 A.2d at 23. A petitioner may not use mandamus to direct the Board to release him. Id.

Sentencing courts have no inherent authority to grant paroles. Presley v. Pennsylvania Board of Probation and Parole, 748 A.2d 791 (Pa. Cmwlth. 2000). Any such authority must come from the General Assembly. Id. at 793. Under both the Parole Act in existence at the time the trial court issued its sentencing order, as well as newly enacted 61 Pa.C.S. §6132, courts have authority to grant parole from imprisonment of less than a maximum period of two years.

Mandamus may be used only to compel official performance of a ministerial act or mandatory duty where there is as a clear legal right to relief, a corresponding duty, and a want of any other adequate remedy. Chanceford Aviation. It may not be used to direct the exercise of judgment or discretion in a specific way. Pennsylvania Dental Ass'n. In reviewing a party's preliminary objections, this Court must consider as true all well-pled facts. Ruby. Petitioner alleges in his Petition that the February 2009 sentencing order sentenced him to a maximum sentence of two years. Based on this factual premise, the Board, not the trial court, is vested with exclusive parole authority. 61 P.S. §331.17 (repealed); 61 P.S. §331.26 (repealed); 61 Pa.C.S. §6132; Jones. As indicated in Presley, sentencing courts have no inherent authority to grant paroles. The General Assembly has not granted authority to the trial courts to grant parole for offenses with a maximum sentence of two years or more.



Parole is not a right, but rather a matter of grace. Myers. The Board's determination to grant or deny parole is a matter of discretion and not subject to judicial review. Id. Petitioner does not have a clear right to the relief he seeks and is not entitled to mandamus. Chanceford Aviation. The law will not permit an order from this Court directing the Board, or DOC for that matter, to exercise discretionary authority and immediately release Petitioner on parole. Nickson. Consequently, DOC's preliminary objection in the nature of a failure to state a claim upon which relief can be granted (demurrer) must be sustained. Ruby.

We acknowledge that DOC is responsible for calculating the minimum and maximum terms of prisoners committed to its jurisdiction. Nickson. We further recognize Petitioner's claim, consistent with Detar v. Beard, 898 A.2d 26 (Pa. Cmwlth. 2006), that DOC cannot adjudicate the legality of a sentence or add or delete sentence conditions. Because the trial court was without jurisdiction to make a determination concerning whether Petitioner may be paroled as he was sentenced to a maximum of two years of confinement, however, the trial court's statement that Petitioner was to be immediately paroled was null and void. Commonwealth v. Tilghman, 543 Pa. 578, 637 A.2d 898 (1996). See also Tillman v. Pennsylvania Board of Probation and Parole, 409 A. 2d 949 (Pa. Cmwlth. 1980).

## **II. Failure to Join Necessary Party**

An indispensable, or necessary party, is one whose rights are so directly connected with the claims of the litigants that no decree can be made without impairing those rights. Montella v. Berkheimer Assoc., 690 A.2d

802 (Pa. Cmwlth. 1997). The determination of an indispensable party question involves at least these considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area Sch. Dist. v. Kline, 494 Pa. 476, 431 A.2d 953 (1981).

As indicated above, it is the Board, not DOC, that is vested with exclusive parole authority in this matter as Petitioner's sentence contained a maximum term of two years confinement. 61 P.S. §331.17 (repealed); 61 P.S. §331.26 (repealed); 61 Pa.C.S. 6132; Jones. It is for the Board alone to determine whether or not Petitioner shall be granted parole as a matter of grace. Myers. The Board is unquestionably an indispensable party and no decree can be made without impairing its rights. Consistent with Montella, we sustain DOC's preliminary objection in the nature of a failure to join necessary parties.

### III. CONCLUSION

We sustain DOC's preliminary objections in the nature of a failure to state a claim upon which relief can be granted (demurrer) and a failure to join a necessary party. In light of our rulings, Petitioner's Petition for Writ of Mandamus is dismissed.

---

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marcus Quinones, :  
 :  
 Petitioner :  
 :  
 :  
 v. : No. 668 M.D. 2009  
 :  
 Commonwealth of Pennsylvania, :  
 Pennsylvania Department :  
 of Corrections, :  
 :  
 Respondent :  
 :

**ORDER**

AND NOW, this 1<sup>st</sup> day of September, 2010, we sustain the preliminary objections filed by the Pennsylvania Department of Corrections in the nature of a failure to state a claim upon which relief can be granted (demurrer) and a failure to join a necessary party. Because we sustain these objections, the Petition for Writ of Mandamus filed by Marcus Quinones is dismissed.

---

JIM FLAHERTY, Senior Judge