

[J-111ABC-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NATHANIEL ROGERS,	:	No. 0008 M.D. Appeal
	:	Docket 1997
Appellant	:	
v.	:	Appeal from the Commonwealth
	:	Court Order at No. 1511 C.D.
	:	1996 dismissing the appeal
	:	from the Order of the PA
PENNSYLVANIA BOARD OF	:	Board of Probation and
PROBATION AND PAROLE,	:	Parole dated 4/4/96
	:	J-111A-97
Appellee	:	Submitted: 5/30/97
	:	
	:	
CHRISTOPHER REED,	:	No. 0009 M.D. Appeal
	:	Docket 1997
	:	
Appellant	:	Appeal from the Commonwealth
v.	:	Court Order at No. 1593 C.D.
	:	1996 dismissing the appeal
	:	from the Order of the PA
PENNSYLVANIA BOARD OF	:	Board of Probation and
PROBATION AND PAROLE,	:	Parole dated 4/23/96
	:	J-111B-97
Appellee	:	Submitted: 5/30/97
	:	
	:	
MICHAEL K. MEEHAN,	:	No. 0010 M.D. Appeal
	:	Docket 1997
	:	
Appellant	:	Appeal from the Commonwealth
v.	:	Court Order at No. 1433 C.D.
	:	1996 dismissing the appeal
	:	from the Order of the PA
PENNSYLVANIA BOARD OF	:	Board of Probation and Parole
PROBATION AND PAROLE,	:	dated 3/21/96
	:	J-111C-97
Appellee	:	Submitted: 5/30/97

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: JANUARY 22, 1999

I dissent from the majority's conclusion that a decision of the Pennsylvania Probation and Parole Board (hereinafter "Parole Board") to deny an application for parole upon expiration of an inmate's minimum sentence is not subject to judicial review.

Section 21 of the Act of August 6, 1941, (Parole Act), P.L. 861, as amended, 61 P.S. § 331.21, provides:

The board [of Probation and Parole] is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board...whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby. The power to parole herein granted to the Board of Parole may not be exercised in the board's discretion at any time before, but only after,

the expiration of the minimum term of imprisonment fixed by the court in its sentence...

In Reider v. Pennsylvania Board of Probation and Parole, 100 Pa. Commw. 333, 514 A.2d 967 (1986), the Commonwealth Court determined that since the Parole Board is a Commonwealth agency, whether or not its decision is reviewable is governed by the Administrative Agency Law ("the Law"), 2 Pa. C.S. §§ 701-704. The Law applies "to all Commonwealth agencies regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review." Id. at § 701.

The Law allows appeals from adjudications by Commonwealth agencies. Id. at § 702. It defines "adjudication" as:

[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

Id. at § 101 (emphasis added). The Reider Court concluded that denials of parole are not reviewable by the Commonwealth Court since a Board action denying parole is not an "adjudication" within the purview of Administrative Agency Law. Reider, 100 Pa. Commw. at 338, 514 A.2d at 969. The issue of judicial review of a denial of a parole petition in the wake of Reider has not been addressed by this Court.¹

Prior to Reider, in Bronson v. Pennsylvania Board of Probation and Parole, 491 Pa. 549, 421 A.2d 1021 (1980), cert. denied, 450 U.S. 1050 (1981), this Court addressed whether the Parole Board's decision revoking parole is subject to judicial review. The Court found that the Parole Board is an "administrative agency" within the meaning of the state constitutional provision providing for a right of appeal from an administrative agency to a court of record or to an appellate court pursuant to Article V, Section 9 of the Pennsylvania Constitution. The Court said:

The Constitution of Pennsylvania was amended in 1968 to expressly provide for appeals to court of record from administrative agencies. Section 9 of Article V of our Constitution states:

§ 9. Right of appeal

There shall be a right of appeal in all cases to a court of record

¹The Third Circuit Court of Appeals recently addressed the Commonwealth Court's decision in Reider. See Burkett v. Love, 89 F.3d 135 (3d Cir. 1996).

from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Since the Board of Probation and Parole is an administrative agency of the Commonwealth, the Constitution mandates that a person dissatisfied with its decisions must have the right to appeal that decision "to a court of record or to an appellate court." Id. at 1023.

Thus, Bronson established that under Article V, Section 9, there is a constitutional right to appeal the revocation of parole.

The Reider Court recognized the Court's decision in Bronson but drew a distinction between parole revocations and parole denials. It found a constitutionally protected liberty interest in parole revocations, but no similar interest in parole denials. The Commonwealth Court therein stated, "[I]n a parole revocation hearing the parolee's liberty is at stake but in the matter of a parole release, the inmate, of course, is already confined." Reider, 100 Pa. Commw. at 341, 514 A.2d at 971 (citing Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)). The principle thus emerging from Reider is that unless a protected liberty interest is affected, a prisoner is precluded from the right to appeal pursuant to Article V, Section 9 of the Pennsylvania Constitution.

While the mere possibility of parole affords no constitutional rights to prisoners, a state may confer by statute a liberty interest in parole. Greenholtz, supra, 442 U.S. at 10 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).² The Pennsylvania Probation and

²In Greenholtz, the Court found a liberty interest in denying parole because the Nebraska statutory procedures expressly mandated that its Board of Pardons "shall" order

Parole Act, however, has not done so. Pursuant to 61 P.S. § 331.17, the Pennsylvania Legislature has mandated that the Board shall have "exclusive power" to parole.³ In accordance with 61 P.S. § 331.19, a duty is imposed upon the Board to consider the nature and character of the offense committed, any recommendation made by the trial judge, the general character and history of the prisoner and the written or personal statement or testimony of the victim or the victim's family.⁴ Our courts have consistently found that the Parole Act does not create a liberty interest in parole. Blair v. Pennsylvania Board of

(..continued)

the prisoner's release "unless" one of the specified reasons for denial existed. See Hennessey v. Pennsylvania Board of Pardons, 655 A.2d 218 (Pa. Commw. 1995).

³61 P. S. § 331.17 reads in pertinent part:

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...

⁴61 P. S. § 331.19 reads in pertinent part:

It shall be the duty of the board, upon the commitment to prison of any person whom said board is herein given the power to parole, to investigate and inform itself respecting the circumstances of the offense for which said person shall have been sentenced, and, in addition thereto, it shall procure information as full and complete as may be obtainable with regard to the character, mental characteristics, habits, antecedents, connections and environment of such person. . . . Said investigation shall be made by the board so far as may be practicable while the case is recent, and in granting paroles the board shall consider the nature and character of the offense committed, any recommendation made by the trial judge, the general character and history of the prisoner and the written or personal statement or testimony of the victim or the victim's family submitted pursuant to section 22.1 of this act. . . .

Probation and Parole, 78 Pa. Commw. 41, 467 A.2d 71 (1983), cert. denied, 466 U.S. 977 (1984). Rather, parole is a matter of grace and mercy shown to a prisoner who has demonstrated, to the Board's satisfaction, his ability to function as a law-abiding citizen. Commonwealth ex. rel. Sparks v. Russell, 403 Pa. 320, 169 A.2d 884 (1961).

It does not follow from Appellants' lack of liberty interest, however, that the Parole Board's decision is not subject to appellate review. Bronson established a constitutionally-guaranteed appeal from the Parole Board's actions. Bronson did not limit those appeals to cases implicating liberty interests. The denial of parole may be improperly based on considerations violating other constitutional rights, such as equal protection and substantive due process. See Block v. Potter, 631 F. 2d 233, 235 (3d Cir. 1980)(even though Greenholtz held that there is no liberty interest in parole release, once a state decides to provide that which it is not constitutionally compelled to offer, it does not mean there are no constitutional limitations whatsoever on the basis for making decisions).⁵ As such, I conclude that the guarantee of an appeal established in Article V, Section 9 of the Constitution, that the Court found applies to parole revocation decisions in Bronson, applies equally to parole denials. Accordingly, I would overrule Reider.

Although I would allow judicial review, that review would be limited. In view of the specialized knowledge and expertise required of the Board in making parole

⁵See also Reider, 100 Pa. Commw. at 344, 514 A.2d at 972 (Barry, J., dissenting)(carrying Reider to its logical extreme means that the Board could refuse to grant parole based on race, sex or other improper classification); Burkett v. Love, 89 F.3d 135 (1996)(rejecting Reider and discussing other constitutional rights that the Parole Board could violate).

determinations, our courts have consistently held that we will not interfere with the discretion of the Board. See 61 P.S. § 331.19. See also Commonwealth v. Brittingham, 442 Pa. 241, 275 A.2d 83 (1971)(granting of parole is not a matter of right but a matter of administrative discretion); Commonwealth v. Vladyka, 425 Pa. 03, 229 A.2d 920 (1967) (broad discretion committed to parole board by legislature).

At the same time, once the legislature establishes a system of parole, a person seeking parole is entitled to have his application properly and fairly processed, and the Board has a mandatory duty to exercise its discretion in accordance with the United States and Pennsylvania Constitutions. Indeed, the presence of a large measure of discretion in a parole system does not amount to a license for arbitrary parole decisions founded on impermissible criteria. Block v. Potter, 631 F. 2d 233, 236 (3d Cir. 1980).

In recognition, however, of the broad grant of discretion empowered to the Board in parole matters by statute, appellate review of a Board order granting or denying parole is limited to a determination of whether the Board failed to exercise any discretion at all, whether the Board arbitrarily and capriciously abused its discretion so as to amount to a violation of a constitutional right, and whether or not the Board violated any constitutional rights of the prisoner.⁶

⁶Prior to the Commonwealth Court's decision in Reider, a prisoner having been denied parole could challenge that decision in the courts on the limited basis that the Board (1) failed to exercise any discretion; (2) abused its discretion; or (3) violated the prisoner's constitutional rights. Barnhouse v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 512, 492 A.2d 1182(1985); Counts v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 277, 487 A.2d 450 (1985); Kastner v. Pennsylvania Board of Probation and Parole, 78 Pa. Commw. 157, 467 A.2d 89 (1983); Banks v. Pennsylvania

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In sum, I would reverse the Orders of the Commonwealth Court dismissing Appellants' appeals and remand these matters to the Commonwealth Court for review consistent with this opinion.

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Board of Probation and Parole, 4 Pa. Commw. 197 (1971).