FILED BY CLERK
MAY 14 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LARRY LEE WASHINGTON, Petitioner.	2 CA-CR 2008-0363-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-16604

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Daniel P. Schaack
Tucson
Attorneys for Respondent

Larry Lee Washington
Florence
In Propria Persona

V Á S Q U E Z, Judge.

¶1 In 1986, a jury found petitioner Larry Lee Washington guilty of first-degree burglary, kidnapping, sexual assault, and theft by control, all committed in October 1985. He was convicted and sentenced to aggravated, enhanced prison terms totaling sixty years. Specifically, the trial court ordered Washington to serve concurrent terms for the burglary

and theft, the longer of which was thirty years, and, consecutively to those sentences, to serve concurrent, thirty-year terms for kidnapping and sexual assault. We affirmed his convictions and sentences on appeal. *State v. Washington*, No. 2 CA-CR 4527-2 (memorandum decision filed Jan. 8, 1987).

¶2 In May 2008, Washington initiated this successive post-conviction relief proceeding with the filing of a petition pursuant to Rule 32, Ariz. R. Crim. P.[1] In his petition below, he challenged the March 2008 determination by the Arizona Department of Corrections (ADOC) that, based on the provisions of A.R.S. § 13-1406(B), he is ineligible for early release of any kind on his sentence for sexual assault. According to Washington, this decision violated his rights to due process and equal protection of the law, and he seeks its reversal.

¶3 We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). But "[a] court abuses its discretion if it commits legal error in reaching a discretionary conclusion." *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 41, 144 P.3d 519, 532 (App. 2006). In this case, we conclude the court abused its discretion in failing to grant Washington relief pursuant to *Tarango* and *State v. Murray*, 194 Ariz. 373, ¶ 10, 982 P.2d 1287, 1289 (1999).

¶4 The following history is not disputed. In March 2006, the Arizona Board of Executive Clemency (the Board) granted Washington institutional parole to his consecutive sentences. The proclamation of parole did not specify which two sentences were subject to

[1]This appears to be either Washington's fourth or fifth Rule 32 proceeding.

parole and which two remained to be served, however, and no transcript of the Board proceeding was before the trial court.

¶5 Washington insisted in his petition below that members of the Board had indicated that parole had been granted for the sexual assault and kidnapping sentences and that he would be able to seek clemency on his remaining sentences after serving two more years. Two years later, he sought a determination of his eligibility for parole or commutation of those sentences, and ADOC informed him he was and would remain ineligible for release until his sentence for sexual assault expired in 2036.

¶6 In a somewhat cryptic argument, Washington maintained in his petition for post-conviction relief that ADOC had erred because, in his case, the sexual assault "was deemed a repetitive offense" under former A.R.S. § 13-604.[2] In support of his claim, he cited *State v. Tarango*, 185 Ariz. 208, 914 P.2d 1300 (1996), *affirmed on rehearing by State v. Arizona Department of Corrections*, 187 Ariz. 211, 928 P.2d 635 (1996). But he did not state the holding of that case or explain its relevance to his eligibility for parole.

¶7 In a response supported by the affidavit of an ADOC time-computation specialist, the state maintained Washington had been institutionally paroled on the burglary and theft sentences and was currently serving the sentences for his sexual assault and kidnapping convictions. The state argued ADOC had correctly determined that any early

[2]The provisions of Arizona's criminal code were renumbered effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer in this decision to the statutes as they were numbered when Washington committed his offenses, rather than by their current section numbers.

release on Washington's sentence for sexual assault was foreclosed by § 13-1406(B), which, at the time of Washington's offenses, provided:

> Sexual assault of a person fifteen years of age or older[3] is a class 2 felony, and the person convicted is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by [A.R.S.] section 31-233, subsection A or B until the sentence imposed by the court has been served.[4]

1985 Ariz. Sess. Laws, ch. 364, § 19. The state did not address Washington's reference to *Tarango*. In denying relief, the trial court agreed with the state and suggested the Board must have paroled Washington on the burglary and theft convictions because he had served only twenty years of those concurrent, thirty-year sentences, and "if [he] had served time for [the sexual assault] first, he would have served 30 years before beginning time on the consecutive counts."

¶8 In his petition for review, Washington repeats the arguments he raised below, emphasizing his protected liberty interest in eligibility for clemency as well as his understanding, derived from his review hearing, that the Board had already granted him parole on the sexual assault charge. In response, the state argues § 13-1406 precluded the Board from paroling Washington on the sexual assault charge and that any such order would

---

[3]Although a box marked in the trial court's sentencing minute entry seems to implicate A.R.S. § 13-604.01, this was clearly a clerical error. Washington was not charged with a dangerous crime against a child, *see id.*, and according to the trial transcript, the victim of his sexual assault was twenty-nine years old.

[4]Section 31-233(A) and (B) pertained to temporary removal or release of an inmate for administrative or compassionate reasons. 1985 Ariz. Sess. Laws, ch. 36, § 1.

have been null and void. Quoting *Cook v. Cook*, 26 Ariz. App. 163, 169, 547 P.2d 15, 21 (1976), *abrogated on other grounds by Mezey v. Fioramonti*, 204 Ariz. 599, 65 P.3d 980 (App. 2003), the state further suggests we employ the "'presumption . . . that public officials correctly perform their express duties'" to conclude the Board could only have paroled Washington on the sentences for burglary and theft.

¶9 Although the state correctly reviews the version of § 13-1406(B) in effect when Washington committed his offenses, Washington was also sentenced as a repeat offender under former § 13-604. In 1985, § 13-604(G) provided that a defendant convicted of a dangerous-nature, class two felony, and who, like Washington, previously had been convicted of a dangerous-nature, class one, two, or three felony,

> shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in section 13-701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement . . . until not less than two-thirds of the sentence imposed by the court has been served.

1985 Ariz. Sess. Laws, ch. 364, § 4.[5]

¶10 In *Tarango*, our supreme court held a repeat offender convicted of selling narcotics in violation of A.R.S. § 13-3408 and sentenced to an enhanced term pursuant to § 13-604 would be eligible for parole after serving two-thirds of her sentence, as provided

---

[5]Thus, Washington received thirty-year sentences for the sexual assault, kidnapping, and burglary convictions because the trial court had applied § 13-604 to impose an aggravated sentence equal to four times the seven-year term authorized by § 13-701 for these class two felonies, *see* 1978 Ariz. Sess. Laws, ch. 201, §§ 104, 105, and then added two additional years to the sentences because Washington had committed the offense while released on bond. *See* former § 13-604(M), 1985 Ariz. Sess. Laws, ch. 364, § 4.

by § 13-604, despite language in § 13-3408(D) that would have precluded her "release from confinement on any . . . basis until [she had] served the sentence imposed by the court." *Tarango*, 185 Ariz. at 209-10, 914 P.2d at 1301-02. The court found § 13-604 governed Tarango's parole eligibility based on "the exclusive penalty language" of § 13-604(K), which had provided, "The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous convictions . . . [are] charged in the indictment or information and admitted or found by the trier of fact." *Tarango*, 185 Ariz. at 209-10, 914 P.2d at 1301-02. Accordingly, our supreme court concluded Tarango would be eligible for parole after serving two-thirds of her sentence and directed that ADOC "should henceforth calculate parole eligibility dates in accordance with this opinion. Post-conviction relief is available to correct any denial of parole eligibility which is at variance with this opinion." *Id.* at 212, 914 P.2d at 1304.

¶11 Since *Tarango* was decided, we have recognized that the language of former § 13-604(K) may not exclude all other penal provisions. In *State v. Johnson*, 195 Ariz. 553, ¶¶ 6, 8, 991 P.2d 256, 257-58 (App. 1999), for example, we held A.R.S. § 13-604.02(B) required a repeat offender to serve his full sentence for a crime he committed while on probation because § 13-604.02(B)—unlike the statute considered in *Tarango*—was written to apply "[n]otwithstanding any provision of law to the contrary." But our supreme court has specifically held the flat-time provision in § 13-1406(B), like the similar provision in the narcotics statute at issue in *Tarango*, has no effect when a defendant was sentenced before 1997 to an enhanced penalty under § 13-604. *Murray*, 194 Ariz. 373, ¶¶ 2, 9-10, 982 P.2d at 1287, 1288-90 (holding 1997 amendment of § 13-604 had prospective application only).

Murray reiterated that post-conviction relief would be available to correct any denial of parole eligibility resulting from ADOC's failure to follow the court's directives. *Id.* ¶ 10; *see also State v. Ariz. Dep't of Corrections*, 187 Ariz. 211, 213, 928 P.2d 635, 637 (1996) (post-conviction relief available "to those whose parole eligibility could not be resolved administratively, for whatever reason").

¶12 Thus, Washington is correct that he is entitled to a recalculation of his parole eligibility based on the relevant provisions of the version of § 13-604 in effect in October 1985—without regard for the flat-time provision found in § 13-1406(B)—as required by *Tarango* and *Murray*.[6] We grant that relief and direct ADOC to redetermine Washington's release eligibility status accordingly.

¶13 One other issue remains to be addressed on remand. In their briefs, below and on review, both parties rely on the disputed action taken by the Board at Washington's 2006 hearing, and Washington has requested an evidentiary hearing to resolve this issue. In light of this decision, it appears to make no difference whether Washington was paroled on the sexual assault and kidnapping charges or the burglary and theft charges. Washington's concurrent sentences for burglary and theft amounted to a thirty-year term, as did his

---

[6]For purposes of preclusion analysis, we note Washington's challenge to his parole-eligibility calculation is a claim for relief under Rule 32.1(d), which is not subject to preclusion for failure to raise the claim in an earlier proceeding. *See* Ariz. R. Crim. P. 32.2(b); *cf. State v. Shrum*, 220 Ariz. 115, ¶ 23, 203 P.3d 1175, 1180 (2009) (claim of sentencing error under Rule 32.1(c) precluded absent "significant change in the law" under Rule 32.1(g)). Based on the affidavit Washington filed below, he was not previously aware of restrictions ADOC had placed on his parole eligibility. *See* Ariz. R. Crim. P. 32.2(b) (defendant must cite meritorious reason for failing to bring claim under Rule 32.1(d) in timely manner).

concurrent sentences for sexual assault and kidnapping. Both sentences were imposed under former § 13-604, and pursuant to *Tarango*, both are subject to the release eligibility provisions of that statute.

¶14 Nonetheless, we are reluctant to deny Washington's request for an evidentiary hearing without knowing whether the specific action taken by the Board might affect, in some other way, ADOC's determination of Washington's eligibility for release. We therefore remand the case to the trial court to determine, after consultation with the parties, whether Washington's request for an evidentiary hearing is meritorious or has been rendered moot by this decision.

¶15 For all of the foregoing reasons, we grant review, grant relief as stated in ¶ 12, *supra*, and remand this case to the trial court for proceedings consistent with this decision.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge